

Means of proof

Sexual and Gender-Based Violence Crimes

Case Matrix Network

The Case Matrix Network ('CMN') provides knowledge-transfer and capacity development services to national and international actors in the fields of international criminal and human rights law. We seek to empower those working to provide criminal accountability for violations of core international crimes and serious human rights violations, by providing access to legal information, legal expertise and knowledge tools. The CMN is a department of the Centre for International Law Research and Policy ('CILRAP'), which is an international non-profit organisation, registered in Belgium.

Acknowledgments

Research on this publication was conducted by Andreja Jerončič and Aleksandra Sidorenko, with support provided by Auriane Botte-Kerrison and Marialejandra Moreno Mantilla. The means of proof charts were conceptualised by Emilie Hunter, Andreja Jerončič and Ilia Utmelidze. The publication was revised and edited by Emilie Hunter and Ilia Utmelidze. Primary sources for this publication include the Core International Crimes Database and the Legal Requirements Framework, developed by Morten Bergsmo and Ilia Utmelidze. The CMN wishes to thank all members of the independent expert reference group for their review of the Guidelines, including Stephanie Barbour, Kim Seelinger and Patricia Viseur-Sellers. In addition, Sara Ferro Ribeiro and Danaé van den Straten provided valuable feedback on the structure and purpose of the publication.

© Centre for International Law Research and Policy, November 2017

ISBN: 978-82-8348-183-9.

LTD-PURL: <http://www.legal-tools.org/doc/e06a52/>.

This document is part of the 'Guidelines, manuals and reports' service in the CMN Knowledge Hub. You can find more reports at the CILRAP web page: <https://www.casematrixnetwork.org/cmn-knowledge-hub/guidelines-manuals-and-reports/>.

Designed by Vesna Skornšek
www.vesnaskornsek.com

This publication was made possible through a grant by the Magna Carta Fund for Human Rights and Democracy of the Foreign and Commonwealth Office (FCO). It forms part of the project "Strengthening the prosecution of sexual violence in conflict: CAR, Colombia, and DRC" which is implemented in partnership with the Commission for International Justice and Accountability (CIJA) and the University of Nottingham Human Rights Law Centre (HRLC). The contents of this publication are the sole responsibility of CMN and can in no way be taken to reflect the views of the FCO.

Table of Contents

Acknowledgments

1. Introduction	4
1.1. Purpose	6
1.2. Methodology	7
1.3. Structure	11
1.4. Glossary of key terms and acronyms	14
2. Contextual requirements of sexual and gender-based violence crimes	18
2.1. Genocide (ICC Art. 6)	19
2.2. Crimes against humanity (ICC Art. 7)	20
2.3. War crimes: international armed conflict – serious violations (ICC Art. 8(2)(b))	20
2.4. War crimes: non-international armed conflict – other serious violations (ICC Art. 8(2)(e))	20
3. Rape	22
4. Sexual slavery	40
5. Enforced prostitution	58
6. Forced pregnancy	70
7. Enforced sterilisation	80
8. Other forms of sexual violence of comparable gravity	88
9. Genocide by imposing measures intended to prevent births within a group	98
10. Index of case law and commentaries	106

1

1. Introduction	4
1.1. Purpose	6
1.2. Methodology	7
1.3. Structure	11
1.4. Glossary of terms	14

1. Introduction

Sexual violence – committed against females and males – remains a persistent hallmark on numerous armed conflicts, atrocities and national emergencies. Achieving accountability – particularly with regard to individual criminal responsibility – for such violence remains limited in many jurisdictions. The reasons for this are manifold: in many instances, sexual and gender-based violence crimes (‘SGBV’) are veiled with social stigmas, frequently under-reported and inadequately reflected in social and public health policies as well as in domestic criminal law, while criminal justice actors may require additional resources, skills and training to respond appropriately to the complexity and sensitivities of SGBV crimes.

However, the prevalence of sexual violence in conflict and atrocity has gained visibility in recent years.¹ Political momentum from international and domestic spheres has enabled various actors to tackle its causes and effects.² Institutional and policy reforms have enabled more coherent approaches to providing accountability to sexual violence in conflict and atrocity,³ while several milestone judgments have been rendered in international and national jurisdictions, building on the legacies of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), the International Criminal Tribunal for Rwanda (‘ICTR’) and the Special Court for Sierra Leone (‘SCSL’), the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) and the International Military Tribunal (‘IMT’).⁴ Opportunities to strengthen national accountability options for SGBV crimes can be seen alongside engagement with and by the International Criminal Court (‘ICC’).⁵ They also include the establishment of the Special Criminal Court in CAR,⁶ the adoption of the Protocol for the Investigation of Sexual Violence by the Colombian Attorney General’s Office (‘AGO’)⁷ and its role in the prospective Special Jurisdiction for Peace⁸, and the adoption of ICC implementing legislation in DRC, which substantially

- 1 A number of initiatives and academic publications have focused on addressing sexual and gender-based violence: see UN Women, [UNiTE to End Violence Against Women Campaign](#); UN Action against Sexual Violence in Conflict, [Stop Rape Now](#); Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, OUP, 2016; Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, TOAEP, Beijing, 2012; Morten Bergsmo, Alf Butenschøn Skre and Elisabeth J. Wood (eds.), *Understanding and Proving International Sex Crimes*, TOAEP, Beijing, 2012.
- 2 A Global Summit to End Sexual Violence in Conflict, held in London in June 2014, resulted in the adoption of the Foreign & Commonwealth Office, [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law](#) (1st ed.), London, June 2014 (‘PSVI Protocol’). The second edition of the Protocol was published in March 2017.
- 3 See ICC, Office of the Prosecutor (‘OTP’), [Policy Paper on Sexual and Gender-Based Crimes](#), June 2014; Government of the CAR and the United Nations, [Joint Communiqué of the Government of the Central African Republic and the United Nations](#), 12 December 2012; CAR, [Décret n°15.007 du 8 janvier 2015 portant création d’une unité mixte d’intervention rapide et de répression des violences sexuelles faites aux femmes et aux enfants](#); Tessa Khan and Jim Wormington, “Mobile Courts in the DRC: Lessons from Development for International Criminal Justice”, in *Oxford Transitional Justice Research Working Paper Series*, 2011; International Legal Assistance Consortium (‘ILAC’) and International Bar Association (‘IBA’), [Re-building courts and trust: An assessment of the needs of the justice system in the Democratic Republic of the Congo](#), August 2009.
- 4 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, TC III, Judgment, Case No. ICC-01/05-01/08, 21 March 2016; DRC, High Military Court, Case *Kakwavu*, Judgment, 7 November 2014; Colombia, Constitutional Court, Order no. 092/08, 14 April 2008; Colombia, Constitutional Court, Order no. 009/15, 27 January 2015; Senegal, Extraordinary African Chambers, *The Prosecutor v. Hissène Habré*, Judgment, 30 May 2016.
- 5 See, for example, communications submitted to the ICC regarding SGBV crimes committed against Yazidi women and girls by the Global Justice Center or SGBV crimes committed during the Colombian conflict by the European Center for Constitutional and Human Rights (‘ECCHR’), Sisma Mujer and the Colectivo de Abogados José Alvear Restrepo (‘CAJAR’). See also ICC, *The Prosecutor v. Bosco Ntaganda*, TC VI, [Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9](#), Case No. ICC-01/04-02/06-1707, 4 January 2017, paras. 47 and 52-53, which asserted that SGBV crimes could be committed against members of the same armed forces, regardless of any possible status as combatants.
- 6 See [Loi organique No 15.003 portant création, organisation et fonctionnement de la Cour Pénale Spéciale](#), 3 June 2015.
- 7 Colombia, AGO, [Protocol for the Investigation of Sexual Violence](#), June 2016.
- 8 [Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace](#), November 2016.

replicates ICC crimes and liabilities into domestic legislation and enables all conflict-related SGBV crimes to be heard in the ordinary courts.⁹

These Guidelines support such initiatives by providing a concise overview of the means of proof and types of evidence of seven underlying acts of SGBV proscribed under the ICC Statute: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, other forms of sexual violence and genocide by measures intended to prevent births.

1.1. Purpose

The Guidelines are directed to practitioners who wish to familiarise themselves with the evidence required to establish legal requirements of SGBV crimes under international criminal law. Emblematic international and selected historic national case law that address each of the seven SGBV crimes under the ICC Statute are reviewed, in order to provide:

- An overview of the legal requirements of underlying acts of SGBV crimes under the ICC Statute;
- Access to the relevant paragraphs of case law that address the means of proof of SGBV crimes;
- Empirical means of proof and evidence typology charts of each of the SGBV crimes;
- Understanding of the evidentiary requirements of SGBV crimes as well as their trends and divergences.

The Guidelines also provide an outline of the legal requirements of genocide, crimes against humanity and war crimes.

SGBV crime/Underlying act	International crime/Contextual requirement			
	Genocide (ICC Art. 6)	CAH (ICC Art. 7)	WC - IAC (ICC Art. 8(2)(b))	WC - NIAC (ICC Art. 8(2)(e))
Rape	Bodily or mental harm (ICC Art. 6(b))	✓	✓	✓
Sexual slavery		✓	✓	✓
Enforced prostitution		✓	✓	✓
Forced pregnancy		✓	✓	✓
Enforced sterilisation		✓	✓	✓
Other forms of sexual violence		✓	✓	✓
Genocide (measures intended to prevent births)	✓			

Table 1: Underlying acts and contextual requirements of SGBV crimes under the ICC Statute.

CAH: crimes against humanity | WC: war crimes | IAC: international armed conflict | NIAC: non-international armed conflict

9 Laws implementing the Rome Statute of the ICC were adopted in January 2016: *Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Loi n° 15/023 du 31 décembre 2015 modifiant la Loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire 31 December 2015 and Loi n° 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 06 août 1959 portant Code de procédure pénale 31 December 2015*. See also CMN, *National Legal Requirements: Prosecution of Sexual and Gender-Based Violence in the Democratic Republic of Congo*, March 2017.

How can the Guidelines assist practitioners?

- Research aid on the evidence of SGBV crimes admitted in key international and historic national cases;
- Structural support for evidence collection and prosecution strategies;;
- Structural support for calls for legal reform, where national evidentiary requirements are ill-suited to conflict-related sexual violence;
- Available in English, French and Spanish.

The Guidelines can be used alongside the International Criminal Law Guidelines: Sexual and Gender-Based Violence Crimes¹⁰, which provide case law and publicist commentaries on the legal requirements of each SGBV crime under the ICC Statute.¹¹

1.2. Methodology

The Guidelines are a compilation of the case law of 20 emblematic international cases addressing conduct that amounts to SGBV crimes,¹² drawn from the ICC, ICTY, ICTR, SCSL, ECCC and IMT, as well as selected historic domestic cases from the Netherlands Temporary Court-Martial at Batavia, the District Court of Jerusalem and the Supreme National Tribunal of Poland.¹³ Quotations of case law are organised according to the legal requirements of the seven crimes, using the Legal Requirements Framework for Core International Crimes and Modes of Liability ('Legal Requirements Framework').

The Legal Requirements Framework: a structure to identify unlawful behaviour under international criminal law

The Legal Requirements Framework provides a structure to aid the interpretation and analysis of the crimes and liabilities found within the ICC Statute, as well as its Elements of Crimes ('EoC')¹⁴. It helps to understand two fundamental dimensions of unlawful behaviour under international criminal law: the *structure* and the *composition* of international crimes and liabilities.

Structure of SGBV crimes and liabilities: legal requirements

International SGBV crimes consist of two parts: the *contextual requirement* (genocide, crimes against humanity or war crimes) and the *underlying act/s* (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, other forms of sexual violence or genocide by imposing measures intended to prevent births within the group). The underlying act/s become an international crime by 'being embedded'¹⁵ in this contextual part. In addition to proving the context and underlying acts, the liability of individual perpetrators for these crimes must also be established. Each of these parts can be referred to as a *legal requirement*.

¹⁰ CMN, *International Criminal Law Guidelines: Sexual and Gender-Based Violence*, June 2017.

¹¹ *Ibid.*

¹² The Guidelines include selected cases where alternative charges were used for conduct amounting to SGBV crimes.

¹³ Logistical restrictions of the current volume have prevented review of a broader number of domestic jurisprudence with substantial jurisprudence on conflict-related SGBV crimes, such as Bosnia and Herzegovina.

¹⁴ A subsidiary legal source of the ICC; see ICC Art. 21.

¹⁵ Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 880.

Composition of SGBV crimes and liabilities: components of the legal requirements

As Table 2 shows, each legal requirement consists of two elements, which together establish the structure of prohibited acts and criminal behaviour defined by the ICC Statute: *actus reus* (material elements) and *mens rea* (mental elements).

Actus reus The act or omission of each crime and mode of liability, that comprise the physical element of the crime, such as the conduct, consequences and circumstances, which are objective in their nature

Mens rea The psychological state of a perpetrator that requires proof of intent and knowledge for the respective *actus reus*, which is subjective in nature

Contextual requirement		Underlying act/s		Liability
<i>actus reus</i>		<i>actus reus</i>		<i>actus reus</i>
	+		+	
<i>mens rea</i>		<i>mens rea</i>		<i>mens rea</i>

Table 2. Criminal behaviour in international criminal law according to its legal requirements and components.

Under the ICC Statute, each of the current crimes and their underlying acts are further defined in the Elements of Crimes. However, the *mens rea* of ICC Art. 30 does not have a similar subsidiary source to clarify its application to the contextual requirements and their underlying acts. The Elements of Crimes specifies that ICC Art. 30 should apply as a “default rule”¹⁶ to each of the *actus reus*. However, the document limits its assessment of the *mens rea* requirements to selected elements of crimes.

To address this gap, the Legal Requirements Framework adapts the logic of the Elements of Crimes and applies it to the *mens rea* of ICC Art. 30, to provide a complete structure of the legal requirements of all ICC Statute crimes, underlying acts and liabilities. ICC Art. 30 requires that individual criminal responsibility be found only where the *actus reus* are committed with *intent* and *knowledge*:¹⁷ it connects intent to the *actus reus* that establish *conduct* or *consequences*¹⁸, whereas knowledge is connected to *actus reus* that require *awareness* of a *consequence* or a *circumstance*.¹⁹

¹⁶ According to the General Introduction of the EoC: “As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”, *ICC Elements of Crimes*, para. 2 of General introduction.

¹⁷ ICC Art. 30(1).

¹⁸ ICC Art. 30(2).

¹⁹ ICC Art. 30(3).

The Legal Requirements Framework adopts four types of *mens rea* that are consistent to ICC Art. 30:

Conduct	[ICC Art. 30(2)] Intent in relation to conduct Intent of the perpetrator to engage in the criminal conduct of the <i>actus reus</i> (criminal act or omission)
Consequence I	[ICC Art. 30(2)] Intent in relation to a consequence Intent of the perpetrator to cause the consequence of the <i>actus reus</i> – the perpetrator meant to cause the consequence
Consequence II	[ICC Art. 30(2) and (3)] Intent or knowledge in relation to a consequence Intent or awareness of the perpetrator that the consequence of the <i>actus reus</i> will occur in the ordinary course of events
Circumstance	[ICC Art. 30(3)] Knowledge in relation to a circumstance Awareness of the perpetrator that a specific circumstance exists or will occur in the ordinary course of events

By combining the structure of SGBV crimes and liabilities, as well as their composition, it is possible to provide a rigorous and coherent framework for SGBV crimes, as well as alternative charges and liabilities²⁰ that can be used for multiple investigative, prosecutorial and adjudicative functions.

To provide an example for the SGBV crime of rape, the Elements of Crimes document identifies two *actus reus* but it does not assign *mens rea* to these elements. Table 3 below shows how the Legal Requirements Framework deconstructs the elements of rape into its *actus reus* and *mens rea*, while also breaking each requirement down into its component parts.

Organising decisions and judgments of international criminal tribunals

The Legal Requirements Framework can also be used to identify and organise relevant paragraphs of international or national decisions, according to the crimes and liabilities of the ICC Statute.²¹ This supports the development of methodologically rigorous collections of jurisprudence, organised according to the elements of each crime, underlying act and liability as well as their means of proof.²² Information is sought for its elucidation of the definition and scope of a specific crime or mode of liability. It is then analysed for relevance or repetition of earlier jurisprudence. Finally, once review procedures are complete, data management solutions enable texts to be quickly filtered, accessed and translated. It is the same methodological structure that underpins the Case Matrix²³ and the Core International Crimes Database ('CICD').²⁴ This provides a clear and consistent framework to interpret the crimes in the ICC

²⁰ Subsequent volumes will address alternative charges for SGBV and the relevant modes of liabilities.

²¹ This is completed by (i) deconstructing the leading judgments, decisions and opinions; (ii) linking the paragraphs with deliberations on the admitted or insufficient evidence to the corresponding legal requirements and elements of international crimes and liabilities; (iii) identifying the evidence or means of proof; (iv) clustering the evidence or means of proof.

²² See CMN, *International Criminal Law Guidelines: Command Responsibility* (2nd ed.), December 2016 and CMN, *International Criminal Law Guidelines: Sexual and Gender-Based Violence*, June 2017, CMN, *International Criminal Law Guidelines: Crimes Against Humanity*, February 2017.

²³ Case Matrix is a software platform that provides users with legal information on international criminal law, helps organise case files and manage evidence and contains a database structure for the meeting of law and fact in core international crimes cases. See the [ICC Case Matrix](#) page of the CMN website and Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, TOAEP, 2011.

²⁴ CICD is an online directory that classifies and deconstructs case law and doctrine, according to the means of proof and elements of core international crimes. It consists of three parts: (i) elements of crimes; (ii) means of proof and (iii) modes of liability. See the [CMN ICJ Toolkits Project Blog](#).

Statute, which can guide practitioners, including prosecutors, defence attorneys or judges in the evaluation of available evidence, development of legal arguments and legal analyses.

Legal requirements and components of rape under the ICC Statute

Actus reus 1	The perpetrator invaded the body of a person by conduct resulting in penetration, however slight:	Of any part of the body of the victim or of the perpetrator with a sexual organ [OR] Of the anal or genital opening of the victim with any object or any other part of the body <i>[The concept of “invasion” is intended to be broad enough to be gender-neutral (Elements of Crimes Art. 7(1)(g)-1, footnote 15)]</i>
	The invasion was committed:	By force [OR] By threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent <i>[It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity (EoC Art. 7(1)(g)-1, footnote 16)]</i>
Mens rea 1	Conduct	The perpetrator meant to invade the body of a person
	Consequence	<i>[Consequence I]</i> The perpetrator meant to cause the invasion of the body of a person [OR] <i>[Consequence II]</i> The perpetrator was aware that the invasion of the body of a person would occur in the ordinary course of events
Mens rea 2	Circumstance	The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person’s incapacity to give genuine consent

Possible charges for rape under the ICC Statute

	Genocide	Crimes against humanity	War crimes
Rape	-	Rape (ICC Art. 7(1)(g))	Rape (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm <i>*Footnote 3 under ICC Art. 6(b) Elements of Crimes lists rape as a potential conduct of bodily or mental harm</i>	Torture Persecution	Torture Inhuman treatment Cruel treatment

Table 3. Actus reus and mens rea of, and possible charges for, rape under the ICC Statute.

Contextual requirements for SGBV Crimes

While focusing on underlying acts of SGBV crimes, the Guidelines also include the contextual requirements under which these can be perpetrated (see Table 1):

- Genocide (ICC Art. 6)
- Crimes against humanity (ICC Art. 7)
- War crimes: International armed conflict ('IAC') – serious violations (ICC Art. 8(2)(b))
- War crimes: Non-international armed conflict ('NIAC') – other serious violations (ICC Art. 8(2)(e))

Additional materials

- CMN, International Criminal Law Guidelines: Sexual and Gender-Based Violence, July 2017 (English, Spanish, French)
- CMN, International Criminal Law Guidelines: Crimes Against Humanity, February 2017 (English, Georgian, Spanish)
- CMN, International Criminal Law Guidelines: Command Responsibility, November 2016 (English, Georgian, Spanish)

1.3. Structure

Section 1 establishes the purpose, structure and methodology adopted in these Guidelines. It also includes a glossary of key terms.

Section 2 provides the legal requirements charts of the **contextual requirements** of genocide, crimes against humanity and war crimes, according to the Elements of Crimes and Legal Requirements Framework.

Section 3 provides case law for the means of proof of **rape**.

Section 4 provides case law for the means of proof of **sexual slavery**.

Section 5 provides case law for the means of proof of **enforced prostitution**.

Section 6 provides case law for the means of proof of **forced pregnancy**.

Section 7 provides case law for the means of proof of **enforced sterilisation**.

Section 8 provides case law for the means of proof of **other forms of sexual violence**.

Section 9 provides case law for the means of proof of **genocide by imposing measures intended to prevent births within the group**.

Section 10 provides an **index** of the cases which have been cited.

Layout: Means of Proof Digests

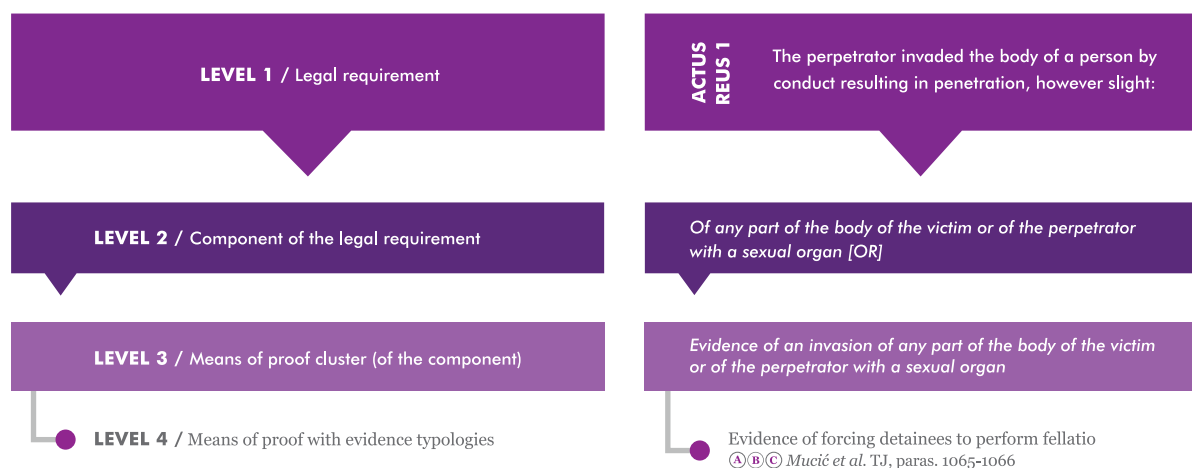
Sections 3 to 9 are organised according to the following stylistic and formal constraints:

Case law	Quotations are chronologically ordered to show the jurisprudential evolution of each of the means of proof of the specific SGBV crimes. The legal issue or relevance of each quotation is introduced and identified by the tribunal, the chamber that issued the decision or judgment and the case name. The tribunal is referenced by its acronym and cases are referenced by the formal case name . Where popular case names exist, they appear in brackets in the first reference and are then adopted subsequently.
References	The Guidelines adopt abbreviated references to the crimes and underlying acts, as adopted in the National Implementing Legislation Database ('NILD') of the ICC Legal Tools Database.
Hyperlinks to the ICC Legal Tools Database	Most documents are hyperlinked to the source document, recorded in the ICC Legal Tools Database, through the footnote reference. Readers using an electronic version can access the document whenever they have an internet connection.
Footnotes	Decisions or judgments are fully referenced when mentioned for the first time within the footnotes: including the institution acronym, the case name (<i>in italics</i>), the acronym of chamber, the type of decision or judgment, the case number, the date it was issued and the paragraph number. Every subsequent mention includes the institution acronym, the case name following the ICC naming convention, a <i>supra</i> reference and the paragraph number. When two successive quotations come from the same decision, the second footnote will not contain all the details of the decision or judgment – except for the paragraph number – but will instead use the term ' <i>ibid</i> '. If there is more than one accused person, only the surname of the first accused will be written, followed by the expression ' <i>et al.</i> '. Where the case law quotation includes footnotes, they will be indicated. This is a discretionary practice: those references that were deemed of little relevance have been removed and acknowledged as such ('citations omitted').
Alternative charge	The Guidelines include selected cases where alternative charges were used for conduct amounting to SGBV crimes. This is indicated below the relevant quotations, through the following reference: international crime / underlying act [article, statute].
Similar means of proof	Reference to similar means of proof of other SGBV crimes are noted at the end of the relevant subsection, with the following reference: SGBV crime/ specific means of proof/page number.

Layout: Means of Proof Charts

A ‘means of proof chart’ summarises the means of proof and evidence typologies for each SGBV crime and is located at the end of each section. It is organised according to the Legal Requirements Framework.

Levels



Typology of evidence

The typology of each means of proof is specified according to an alphabetical key:

TYPOLOGY OF EVIDENCE

- (A) Victim statement
- (B) Witness statement
- (C) Accused statement
- (D) Expert witness statement
- (E) Documentary evidence
- (F) Medical records
- (G) Forensic evidence
- (H) Physical evidence
- (I) Phone, audio and video materials
- (J) Digital evidence
- (K) Maps, geo-location, building structure
- (L) Statistical data
- (M) Contextual data
- Evidence not capable of satisfying the component
- * Similar means of proof under different SGBV crimes/charges

Case references

Ⓐ Ⓑ Ⓒ *Mucić et al.* TJ, paras. 1065-1066

Common case name	Cases are ordered chronologically and according to the evidence typology and use the common case name to identify them.
Type of decision	Decision on the Confirmation of Charges ('DCC'); Trial Judgement ('TJ'); Appeal Judgement ('AJ').
Paragraph	Citation of the relevant paragraph/s containing deliberation on the means of proof.
Hyperlinks	The case name is hyperlinked to the relevant decision, using the ICC Legal Tools Database (online versions only).

1.4. Glossary of terms

AC: Appeals Chamber.

Actus reus: material element of a criminal offence.

Ad hoc tribunals: the two tribunals established by the United Nations Security Council to prosecute persons responsible for committing international crimes in the Former Yugoslavia since 1991 and in Rwanda in 1994. They are also referred to as the ICTY and the ICTR.

Case Matrix digests: a software platform that provides users with legal information on international criminal law, helps organise case files and manage evidence and contains a database structure for the meeting of law and fact in core international crimes cases. Case Matrix digests are part of the ICC Case Matrix application.

Circumstantial evidence: a fact that can be used to infer another fact.

Core International Crimes Database ('CICD'): an online directory that classifies and deconstructs case law and doctrine, according to the means of proof and elements of core international crimes. It consists of three parts: (i) elements of crimes; (ii) modes of liability and (iii) means of proof.

De facto: in fact, whether by right or not; actual.

De jure: according to law.

ECCC: Extraordinary Chambers in the Courts of Cambodia.

Elements: see legal requirements.

Gender: used as defined in ICC Art. 7(3) and referring to the two sexes, male and female, within the context of society. This definition acknowledges social construction of gender and accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.

Gender-based crimes: crimes committed against persons because of their sex and/or socially constructed gender roles. Such crimes are not always a form of sexual violence.

Gender perspective requires understanding differences in status, power, roles, and needs between males and females, and the impact of gender on opportunities and interactions.

Jurisprudence: case law, legal decisions, and legal precedents, which have developed in a particular system or court, such as the ICC.

ICC: International Criminal Court.

ICC Pre-Trial Chamber ('PTC'): the first chamber of the ICC, which decides on issues preceding the trial.

ICTR: International Criminal Tribunal for Rwanda.

ICTY: International Criminal Tribunal for the former Yugoslavia.

International(ised) criminal courts and tribunals: term used to refer to international criminal courts and tribunals and to courts and tribunals with an international feature. This term encompasses the ECCC and the SCSL, *inter alia*.

International case law: international criminal jurisprudence.

International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: a non-binding Protocol containing basic standards of best practice on the documentation of sexual violence as a crime under international law, first published in June 2014. The second edition of the PSVI Protocol was published in March 2017.

Legal requirements: material and mental elements that need to be proven to find an accused guilty of a particular crime.

Legal Requirements Framework: a structure to aid the interpretation and analysis of the crimes and modes of liability found within the ICC Statute and its Elements of Crimes document, which has been used in the process of analysis.

Material facts: facts that need to be proven in order to fulfil all legal requirements of a crime.

Mens rea: mental element of a crime.

Means of proof: material method, source or evidence used to establish the existence of a fact.

National Implementing Legislation Database ('NILD'): a relational database created by the [Human Rights Law Centre](#) ('HRLC') of the University of Nottingham, which forms part of the [ICC Legal Tools Project](#).

SCSL: Special Court for Sierra Leone.

Sexual crimes/sexual violence/sexual and gender-based violence: can be and are often used interchangeably. ‘Sexual crimes’ cover both physical and non-physical acts with a sexual element. Sexual crimes falling under subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes.

TC: Trial Chamber.

Underlying acts: the acts or offences that are perpetrated within the context of genocide, crimes against humanity or war crimes.

2

2. Contextual requirements of sexual and gender-based violence crimes	18
2.1. Genocide (ICC Art. 6)	19
2.2. Crimes against humanity (ICC Art. 7)	20
2.3. War crimes: international armed conflict – serious violations (ICC Art. 8(2)(b))	20
2.4. War crimes: non-international armed conflict – other serious violations (ICC Art. 8(2)(e))	20

2. Contextual requirements of sexual and gender-based violence crimes

SGBV crimes (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, other forms of sexual violence or genocide by imposing measures intended to prevent births within the group) are penalised in international criminal law under different contexts (genocide, crimes against humanity or war crimes). It is by ‘being embedded’²⁵ in this contextual part that the SGBV crimes become an international crime. This section shows the contextual requirements of the international crimes of genocide, crimes against humanity and war crimes in international and non-international armed conflict according to the ICC Statute. In addition to proving the context and underlying acts, the liability of individual perpetrators for these crimes must also be established.²⁶

2.1. Genocide (ICC Art. 6)

Components	Genocide
Belonging	The victim or victims belonged to a particular national, ethnical, racial or religious group
Specific <i>mens rea</i>	The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such
Nexus/Context	The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction
Specific <i>mens rea</i>	The perpetrator was aware that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction

Table 4. Contextual requirements of genocide under the ICC Statute.

²⁵ Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 880.

²⁶ See FCO, International Protocol, *supra* note 2, Chapter 4, ‘Individual Criminal Responsibility’, pp. 43-44.

2.2. Crimes against humanity (ICC Art. 7)

Components	Crimes against humanity
Attack	A course of conduct involving multiple commission of acts
Policy	Pursuant to or in furtherance of a State or organisational policy
Object of the attack	Directed against any civilian population
Character of the attack	Widespread or systematic
Nexus	As part of
Mens rea	With the knowledge of the attack

Table 5. Contextual requirements of crimes against humanity under the ICC Statute.

2.3. War crimes: international armed conflict – serious violations (ICC Art. 8(2)(b))

Components	War crimes in international armed conflict
Context	The conduct took place in the context of and was associated with an international armed conflict
Specific mens rea	The perpetrator was aware of factual circumstances that established the existence of an armed conflict

Table 6. Contextual requirements of war crimes - serious violations in international armed conflict under the ICC Statute.

2.4. War crimes: non-international armed conflict – other serious violations (ICC Art. 8(2)(e))

Components	War crimes in non-international armed conflict
Context	The conduct took place in the context of and was associated with an armed conflict not of an international character
Specific mens rea	The perpetrator was aware of factual circumstances that established the existence of an armed conflict

Table 7. Contextual requirements of war crimes - other serious violations in non-international armed conflict under the ICC Statute.

3

3. Rape 22

- 3.1. [Actus reus 1] The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body 24
- 3.2. [Actus reus 2] The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent 27
- 3.3. [Mens rea 1] 33
- [Conduct] The perpetrator meant to invade the body of a person
 [Consequence I] The perpetrator meant to cause the invasion of the body of a person [OR]
 [Consequence II] The person was aware that the invasion of the body of a person would occur in the ordinary course of events
- 3.4. [Mens rea 2] 36
- [Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent

3. Rape

Legal requirements and components of rape under the ICC Statute			
Actus reus 1	The perpetrator invaded the body of a person by conduct resulting in penetration, however slight:	Of any part of the body of the victim or of the perpetrator with a sexual organ [OR]	
		Of the anal or genital opening of the victim with any object or any other part of the body <i>[The concept of “invasion” is intended to be broad enough to be gender-neutral (Elements of Crimes Art. 7(1)(g)-1, footnote 15)]</i>	
Actus reus 2	The invasion was committed:	By force [OR]	
		By threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent <i>[It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity (EoC Art. 7(1)(g)-1, footnote 16)]</i>	
Mens rea 1	Conduct	The perpetrator meant to invade the body of a person	
	Consequence	<i>[Consequence I]</i> The perpetrator meant to cause the invasion [OR] <i>[Consequence II]</i> The perpetrator was aware that the invasion would occur in the ordinary course of events	
Mens rea 2	Circumstance	The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person’s incapacity to give genuine consent	
Possible charges for rape under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Rape	-	Rape (ICC Art. 7(1)(g))	Rape (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm <i>*Footnote 3 under ICC Art. 6(b) Elements of Crimes lists rape as a potential conduct of bodily or mental harm</i>	Torture Persecution	Torture Inhuman treatment Cruel treatment

Table 8. Actus reus and mens rea of, and possible charges for, rape under the ICC Statute.

3.1. [Actus reus 1] The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ or the anal or of genital opening of the victim with any object or any other part of the body

Invasion of any part of the body of the victim or of the perpetrator with a sexual organ [OR]

Evidence of an invasion of any part of the body of the victim or of the perpetrator with a sexual organ

The ICTY Trial Chamber in *Mucić et al. (“Čelebići”)* held that forcing detainees to perform fellatio could constitute rape:

- Ⓐ Victim statement
- Ⓑ Witness statement
- Ⓒ Accused statement

[Two brothers were ordered] to remove their trousers in front of the other detainees. [They were then forced] to kneel down and take the other one’s penis into [their] mouth for a period of about two to three minutes [...] in full view of the other detainees.²⁷

[This act of forcing them to perform fellatio] could constitute rape for which liability could have been found if pleaded in the appropriate manner.²⁸

Alternative charges

Grave breach of the Geneva Conventions of 1949 / Inhuman treatment [ICTY Art. 2(b)]

Violations of the laws or customs of war / Cruel treatment [ICTY Art. 3]

The ICTY Trial Chamber in *Furundžija* accepted evidence that the penetration of a victim’s vagina, anus and mouth with a penis would constitute rape:

- Ⓐ Victim statement
- Ⓑ Witness statement

The attacks then moved on to Witness A: Accused B had warned [another soldier] not to hit her as he had “other methods” for women, methods which he then put to use. Accused B hit Witness A and forced her to perform oral sex on him. He raped her vaginally and anally, and made her lick his penis clean. Witness D was forced to watch these assaults.²⁹

²⁷ ICTY, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998, para. 1065 (citations omitted) (*P. v. Zdravko Mucić et al. TJ*).

²⁸ *Ibid.*, para. 1066 (citations omitted).

²⁹ ICTY, *The Prosecutor v. Anto Furundžija*, TC II, Judgement, Case No. IT-95-17/1-T, 10 December 1998, para. 87 (citations omitted) (*P. v. Anto Furundžija TJ*).

The ICC Trial Chamber in *Bemba* followed this approach, while also relying on the evidence of medical and psychological consequences:

- Ⓐ Victim statement
- Ⓔ Medical records

Two of the men penetrated her vagina with their penises. [...] The Chamber finds that [...] two soldiers, by force, invaded [victim's] body by penetrating her vagina with their penises. According to [the victim], the psychological and medical consequences of the events included depression, a fear of armed soldiers, vaginal and stomach ailments, and HIV.³⁰

- Ⓐ Victim statement

[Armed soldier] forced [the victim] around the back of the house, threw her on the ground, and took off her underwear. [...] He then penetrated her vagina with his penis and [two of his colleagues took turns]. Afterwards, [the victim] suffered medical and psychological consequences, including depression, skin disorders, and pelvic pain.³¹

- Ⓐ Victim statement

[T]he soldiers threw [the victim] to the ground and stripped her naked. After four of the soldiers penetrated her vagina with their penises, she lost consciousness. When she regained consciousness, the other soldiers continued raping her, while some of them held her to the ground. [The victim] was bleeding from her vagina. Twelve soldiers in total penetrated her vagina, anus, and mouth with their penises. [...] Afterwards, [the victim] had pain in her vagina and lungs, and psychological problems.³²

In one instance, the Chamber based its findings on evidence of semen around the genital and anal openings:

- Ⓑ Witness statement
- Ⓔ Documentary evidence

At least four [soldiers] dragged [witness'] wife from the kitchen, threw her down, and "slept with" her. [The witness] later saw semen leaking out of her vagina and anus; his wife said that the soldiers had penetrated her.³³

The Chamber also accepted evidence of bodily invasion by a sexual organ in relation to male victims:

- Ⓐ Victim statement
- Ⓔ Documentary evidence

When [the victim] protested, two soldiers took him into a bedroom, and, holding him at gunpoint, penetrated his anus and mouth. Thereafter, [the victim] suffered severe damage to his anus [...] and his family was "completely destroyed".³⁴

³⁰ ICC, *P. v. Jean-Pierre Bemba Gombo* TJ, *supra* note 4, para. 464 (citations omitted). Footnote 1318: "A medical certificate dated 29 October 2004 attests to [the victim's] examination by Médecins Sans Frontières in November 2002 and refers to her as a 'victim of rape'".

³¹ *Ibid.*, para. 472 (citations omitted).

³² *Ibid.*, para. 551 (citations omitted).

³³ *Ibid.*, para. 498 (citations omitted).

³⁴ *Ibid.* In addition to the victim testimony, three sketches by the victim were accepted into evidence and referred to by the Trial Chamber in relation to these facts.

Invasion of the anal or genital opening of the victim with any object or any other part of the body

Evidence of an invasion of the anal or genital opening with any object

The ICTR Trial Chamber in *Akayesu* considered the invasion of sexual organs with a piece of wood as rape:

ⓑ Witness statement

The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by [a witness] in her testimony - the Interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying - constitutes rape in the Tribunal's view.³⁵

The ICTR Trial Chamber in *Muhimana* concluded that the cutting open of the body of the victim, including the vagina, cannot be classified as rape:

ⓑ Witness statement

[T]he Chamber has found that the Accused disembowelled [the victim] by cutting her open with a machete from her breasts to her vagina. The Chamber has carefully considered the Prosecution's submission to consider this act as a rape, and concludes that such conduct cannot be classified as rape. Although the act interferes with the sexual organs, in the Chamber's view, it does not constitute a physical invasion of a sexual nature. However, the Chamber will return to consider this incident under its legal findings on murder.³⁶

Other related crimes referred to by the Chamber

Crimes against humanity / Murder [ICTY Art. 3(a)]

Evidence of an invasion of the anal or genital opening with any other part of the body

No means of proof sourced from the dataset.

35 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 686 (*P. v. Jean-Paul Akayesu* TJ). See also para. 429.

36 ICTR, *The Prosecutor v. Micaeli Muhimana*, TC III, Judgement and Sentence, Case No. ICTR-95-1B-T, 28 April 2005, para. 557 (citations omitted) (*P. v. Micaeli Muhimana* TJ).

3.2. [Actus reus 2] The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent

Invasion by force [OR]

Evidence of use of physical force

The ICTR Trial Chamber in *Musema* accepted evidence of the victim's injuries as the result of physical force used during the invasion:

ⓑ Witness statement

Witness N also testified that the four other men, who initially pinned down the victim, went back to the girl and took turns raping her. She was struggling and started rolling down toward the valley. [The witness] was able to see them rape [the victim] until they were out of sight.³⁷

That night, the witness and three other people went to the [rape] victim and found her badly injured. She was cut all over her body, covered with blood and nail scratches around her neck.³⁸

The ICC Trial Chamber in *Bemba* established the use of physical violence employed by the perpetrators during the invasion:

ⓑ Witness statement

The soldiers beat, kicked, and, after they fell down, undressed the women. While holding weapons, the soldiers took turns penetrating the women's vaginas with their penises.³⁹

Evidence of absence of consent or voluntary participation

The ICTR Trial Chamber in *Musema* accepted evidence of the physical restraint of a victim to establish the absence of consent or voluntary participation:

ⓑ Witness statement

The four people holding [the victim] brought her to the ground. They pinned her down, two holding her arms and two holding her legs. The two holding her legs then spread them, and [the accused] placed himself between them. The witness saw [the accused] rip off [victim's] clothes and underclothes [...] and raped the young woman.⁴⁰

The ICTY Trial Chamber in *Prlić et al.* inferred the absence of consent from the circumstances of the invasion, including the use of force and violence against the victim:

Ⓐ Victim statement

ⓐ Expert witness statement

ⓑ Documentary evidence

The Chamber also established that [...] during an operation [...] to evict Muslim residents [...], several women [...] were subjected to sexual abuse, including forced

37 ICTR, *The Prosecutor v. Alfred Musema*, TCI, Judgement and Sentence, Case No. ICTR-96-13-A, 27 January 2000, para. 852 (citations omitted) (*P. v. Alfred Musema TJ*).

38 *Ibid.*, para. 853.

39 ICC, *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 4, para. 481 (citations omitted).

40 ICTR, *P. v. Alfred Musema TJ*, *supra* note 37, para. 849 (citations omitted).

sexual relations. [T]he Chamber deems that the use of force and violence against [the victim] unquestionably show the lack of consent by the victim.⁴¹

The ICC Trial Chamber in **Bemba** accepted the absence of consent to be inferred from the victim calling out in fear, within the context of preceding and succeeding events:

During the events, [the witness] heard her sister-in-law in the adjacent compound, “call[ing] out like someone who is truly afraid”, but could not see her because of a fence. Later that afternoon, when [the witness’] sister-in-law returned to their house, she explained that she had been “raped” by three soldiers of the same group that attacked [the witness]. Thereafter, she had health problems.⁴²

ⓑ Witness statement

Although [the witness’] testimony does not further specify any details of her sister-in-law’s alleged “rape”, based on her description of the events she personally experienced, the Chamber considers that her use of the term indicates that the perpetrators penetrated her sister-in-law’s body with a sexual organ or otherwise penetrated the anal or genital opening of the victim. In this regard, the Chamber notes [the witness’] evidence that her sister-in-law was calling out in fear; the context in which the events occurred, including what happened to [the witness] in an adjacent compound; and the fact that the events were reported to [the witness] by her sister-in-law soon after they happened. In these circumstances, the Chamber finds that, three soldiers, by force, penetrated the body of [the witness’] sister-in-law with a sexual organ or otherwise penetrated her anal or genital opening.⁴³

Evidence of punishment

No means of proof sourced from the dataset.

Invasion by threat of force or coercion against such person or another person

Evidence of fear of violence (or duress)

The ICTR Trial Chamber in **Akayesu** accepted a victim statement on the use of verbal threats by the perpetrator prior and during the invasion:

[The victim] described being raped along with another sister by two men in the courtyard of their home, just after it was destroyed by their Hutu neighbours and her brother and father had been killed. [The victim] said one of the men told her that the girls had been spared so that they could be raped. She said her mother begged the men, who were armed with bludgeons and machetes, to kill her daughters rather than rape them in front of her, and the man replied that the “principle was to make them suffer” and the girls were then raped. [The victim] confirmed on examination that the man who raped her penetrated her vagina with his penis, saying he did it in an “atrocious” manner, mocking and taunting them.⁴⁴

Ⓐ Victim statement

41 ICTY, *The Prosecutor v. Jadranko Prlić, Bruno Vuković, Slobodan Prljak, Milivoj Petrović, Valentin Ćorić and Berislav Pušić*, TC, Judgement (Volume 1), Case No. IT-04-74-T, 29 May 2013, para. 764 (citations omitted) (*P. v. Jadranko Prlić et al. TJ vol. 1*). For the typology of evidence, see ICTY, *The Prosecutor v. Jadranko Prlić, Bruno Vuković, Slobodan Prljak, Milivoj Petrović, Valentin Ćorić and Berislav Pušić*, TC, Judgement (Volume 3), Case No. IT-04-74-T, 29 May 2013, paras. 872, 978 (citations omitted) (*P. v. Jadranko Prlić et al. TJ vol. 3*).

42 ICC, *P. v. Jean-Pierre Bemba Gombo* TJ, *supra* note 4, para. 465 (citations omitted).

43 *Ibid.*, para. 466 (citations omitted).

44 ICTR, *P. v. Jean-Paul Akayesu* TJ, *supra* note 35, para. 430.

The ICTY Trial Chamber in *Kunarac et al.* similarly established the coercive nature of a sexual intercourse, based on the use of verbal threats:

Ⓐ Victim statement

After these events, “Gaga” told her to have a shower because his commander was coming, and he threatened to kill her if she did not satisfy the commander’s desires. He repeated this when the [accused] walked in. [The victim] took off the trousers of the accused, kissed him all over the body, and then had vaginal intercourse with the accused. [The victim] said she felt terribly humiliated because she had to take an active part in the events, which she did out of fear because of “Gaga’s” threats earlier on [...]. After some time, “Gaga” returned to the room and asked the accused whether he was satisfied, addressing him as “commander”.⁴⁵

The Trial Chamber [...] accepts the testimony of [the victim] who testified that, prior to the intercourse, she had been threatened by “Gaga” that he would kill her if she did not satisfy the desires of his commander, the accused. The Trial Chamber accepts [the victim’s] evidence that she only initiated sexual intercourse with [the accused] because she was afraid of being killed by “Gaga” if she did not do so.⁴⁶

The ICC Trial Chamber in *Bemba* relied on evidence that soldiers were bearing weapons to establish that the invasions took place under duress:

Ⓐ Victim statement

Ⓑ Witness statement

While holding weapons, the soldiers took turns penetrating the women’s vaginas with their penises.⁴⁷

Ⓐ Victim statement

Ⓑ Witness statement

Ⓒ Documentary evidence

When [victim’s husband] protested, two soldiers took him into a bedroom and, holding him at gunpoint, penetrated his anus and mouth.⁴⁸

Ⓐ Victim statement

Twelve soldiers in total penetrated her vagina, anus, and mouth with their penises. At that time, the soldiers were armed with rifles.⁴⁹

Evidence of detention/captivity

The ICTY Trial Chamber in *Kunarac et al.* found evidence that victims were held captive in the accused’s apartment for a specified period of time, during which they were raped:

Ⓐ Victim statement

Ⓑ Witness statement

Ⓒ Digital evidence

The Trial Chamber finds that [two victims] were detained in [the accused’s] apartment for about a week [...]. The Trial Chamber finds that the [accused] had sexual intercourse with the two women in the knowledge that they did not consent.⁵⁰

The ICTY Trial Chamber in *Čelebići* determined that formal detention is a circumstance of invasion:

Ⓐ Victim statement

Ⓑ Witness statement

The Trial Chamber thus finds that [the victim] was raped for the first time on the night of her arrival in the prison-camp. On this occasion she was called out of

45 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, TC II, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 219 (*P. v. Dragoljub Kunarac et al. TJ*).

46 *Ibid.*, para. 645.

47 ICC, *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 4, para. 481 (citations omitted).

48 *Ibid.*, para. 498 (citations omitted).

49 *Ibid.*, para. 551 (citations omitted).

50 ICTY, *P. v. Dragoljub Kunarac et al. TJ*, *supra* note 45, para. 759. See also paras 761-765. For typology of evidence, see paras. 207, 214.

Building A and brought to [the accused] in Building B, who was wearing a uniform. [The accused] then raped her by penetrating her vagina with his penis.⁵¹

Alternative charges

Grave breach of the Geneva Conventions of 1949 / Torture [ICTY Art. 2(b)]

Violation of the laws or customs of war / Torture [ICTY Art. 3(1)(a)]

Violation of the laws or customs of war / Cruel treatment [ICTY Art. 3(1)(a)]

Evidence of psychological oppression

The ICTR Trial Chamber in *Akayesu* accepted evidence of humiliation:

Ⓐ Victim statement

[The victim] confirmed on examination that the man who raped her penetrated her vagina with his penis, saying he did it in an “atrocious” manner, mocking and taunting them. She said her sister was raped by the other man at the same time, near her, so that they could each see what was happening to the other.⁵²

Ⓑ Witness statement

[T]he three women were forced by the Interahamwe to undress and told to walk, run and perform exercises “so that they could display the thighs of Tutsi women.” All this took place, she said, in front of approximately two hundred people. After this, she said the women were raped. [The witness] described in particular detail the rape of [a victim] by Interahamwe who threw her to the ground and climbed on top of her saying “Now, let’s see what the vagina of a Tutsi woman feels like.”⁵³

The ICTY Trial Chamber in *Kunarac et al.* accepted evidence of intimidation:

Ⓐ Victim statement

The three soldiers then took her to the banks of [a river], where the accused tried to obtain information or a confession from [the victim] concerning her alleged sending of messages to the Muslim forces and information about the whereabouts of her valuables while he threatened to kill her and her son. By his attempt to intimidate her, [the accused] also showed his hatred for Muslims, his intention to intimidate her, and his intention to discriminate against Muslims in general, and [the victim] in particular. All three soldiers raped [the victim]. In the course of the rapes, [the accused] forced [the victim] to touch his penis and to look at him. He cursed her. The other two soldiers watched from the car, laughing.⁵⁴

51 ICTY, *P. v. Zdravko Mucić et al.* T.I, *supra* note 27, para. 958.

52 ICTR, *P. v. Jean-Paul Akayesu* T.I, *supra* note 35, para. 430.

53 *Ibid.*, para. 437.

54 ICTR, *P. v. Dragoljub Kunarac et al.* T.I, *supra* note 45, para. 711.

Evidence of abuse of power

The ICTY Trial Chamber in **Čelebići** found evidence of invasion by the camp commander:

- Ⓐ Victim statement
- Ⓑ Witness statement

The Trial Chamber thus finds that [the victim] was raped for the first time on the night of her arrival in the prison-camp. On this occasion she was called out of Building A and brought to [the accused] in Building B, who was wearing a uniform. He began to interrogate her and told her that if she did not do whatever he asked she would be sent to another camp or she would be shot. [The accused] ordered her to take her clothes off, threatened her and ignored her crying pleas for him not to touch her. He pointed a rifle at her while she took her clothes off and ordered her to lie on a bed. [The accused] then raped her by penetrating her vagina with his penis, he ejaculated on the lower part of her stomach and continued to threaten and curse her.⁵⁵

Alternative charges

Grave breach of the Geneva Conventions of 1949 / Torture [ICTY Art. 2(b)]

Violation of the laws or customs of war / Torture [ICTY Art. 3(1)(a)]

Violation of the laws or customs of war / Cruel treatment [ICTY Art. 3(1)(a)]

Evidence of taking advantage of a coercive environment

The ICC Trial Chamber in **Katanga** described the coercive environment that the victim found herself in at the time of the incident:

- Ⓐ Victim statement

After hiding in the bush for part of the day of the attack, [the victim] stated that she was flushed out by a group of six combatants armed with knives, guns and spears, to whom she swore that, contrary to what they were claiming, she was from an ethnic group other than Hema. The Chamber notes that as the [victim] had heard that other persons who had taken flight were being killed and was convinced that death was looming, she was in a state of complete submission at that moment. [T]he Chamber is satisfied that three of her attackers then in turn sexually abused her by vaginal penetration. [I]t appears established that as she was aware of the risks which non-compliance entailed, she had no choice but to suffer in silence.⁵⁶

The Chamber regarded that acts of a sexual nature committed against civilians within the context of an armed offensive to be inherently coercive:

- Ⓐ Victim statement

The Chamber is satisfied that such penetrations could only have taken place with violence and coercion, since in any event the perpetrators told the witness that she had become “their wife”. In the view of the Chamber, such acts of a sexual nature committed by attackers during an armed offensive against civilians are necessar-

55 ICTY, *P. v. Zdravko Mucić et al.* TJ, *supra* note 27, para. 958.

56 ICC, *The Prosecutor v. Germain Katanga*, TC II, Judgement pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 989 (citations omitted) (*P. v. Germaine Katanga* TJ).

ily coercive. In that instance, the coercion was all the more significant in that the crimes were committed collectively against a single victim.⁵⁷

Evidence of absence of consent or voluntary participation

The ICTY Appeals Chamber in *Kunarac et al.* found the circumstance of detention to be so coercive as to make consent impossible:

- Ⓐ Victim statement
- Ⓑ Witness statement

For the most part, the Appellants in this case were convicted of raping women held in de facto military headquarters, detention centres and apartments maintained as soldiers' residences. [...] Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. [...] Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.⁵⁸

The ICTR Trial Chamber in *Muhimana* assessed the victim's consent in light of the coercive circumstances at the time of the incident:

- Ⓐ Victim statement

The Chamber accepts [victim] testimony that [...] she and other refugees who were in hiding were found by the [accused] and a group of *Interahamwe*. Mugonero asked the Accused if he could take away the [victim] so that he could “smell the body of a Tutsi woman”. It is apparent to the Chamber, from the [victim] testimony, that Mugonero's words meant that he wanted to rape her. The Chamber finds that the Accused granted his request, following which Mugonero took the witness to his house in Muramba. There, the [victim] was kept in a locked room, with *Interahamwe* standing guard on the outside of the room, where the witness was raped several times until she escaped on 24 April 1994.⁵⁹

In light of the coercive circumstances prevailing in the Bisesero area at this time, the Chamber is not persuaded by the testimonies of Defence Witnesses [...] that [the victim] consented to “marry”, or cohabit with Mugonero, an *Interahamwe*, who had participated in killing other refugees who had been in hiding with the witness.⁶⁰

The ICTY Trial Chamber in *Prlić et al.* inferred the lack of consent from the circumstances of the incidents:

- Ⓐ Victim statement
- Ⓓ Expert witness statement
- Ⓔ Documentary evidence

The Chamber established that during an operation to expel 90 Muslims [...] from their homes, soldiers [...] forced Muslim women to have non-consensual sexual relations. The Chamber holds that the circumstances of these incidents – the presence of witnesses and the fact that the HVO unit itself when reporting these acts characterised them as rape – show unequivocally that the victims had not given their consent.⁶¹

[A] military policeman sexually penetrated a Muslim woman whom he had expelled from her home, handcuffed, undressed and threatened. Nine other members of the HVO [...] also had sexual relations with the victim that lasted two hours,

57 *Ibid.*, para. 990 (citations omitted).

58 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, AC, Judgement*, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 132 (*P. v. Dragoljub Kunarac et al. AJ*).

59 ICTR, *P. v. Micaeli Muhimana TJ*, *supra* note 36, para. 320.

60 *Ibid.*, para. 322.

61 ICTY, *P. v. Jadranko Prlić et al. TJ vol. 3*, *supra* note 41, para. 761 (citations omitted).

before they took her to the front line and forced her to cross it. The Chamber holds that the circumstances of the incident show unequivocally that the victim did not give her consent.⁶²

The Chamber also established that [...] during an operation [...] to evict Muslim residents [...], several women [...] were subjected to sexual abuse, including forced sexual relations. [T]he Chamber deems that the use of force and violence against [the victim] and the extreme humiliation she suffered at the time of the events and after, notably due to the presence of her family during the sexual acts committed successively by nine HVO soldiers, unquestionably show the lack of consent by the victim.⁶³

Evidence of incapacity to give genuine consent

The ICC Trial Chamber in **Bemba** considered that the victim was incapable of giving consent as she was unconscious during the invasion:

Having dragged [the victim] into a compound, the soldiers forcefully took off her clothes, threatened her with a weapon, threw her on the ground, and restrained her arms. Two of the men penetrated her vagina with their penises. She lost consciousness and then “could feel the pain of what they were doing”.⁶⁴

④ Victim statement

Upon arrival at the camp near the river, the soldiers threw V1 to the ground and stripped her naked. After four of the soldiers penetrated her vagina with their penises, she lost consciousness.⁶⁵

3.3. [Mens rea 1]

[Conduct] The perpetrator meant to invade the body of a person

Evidence inferred from an utterance, a document or a deed

The ICTY Trial Chamber in **Kunarac et al.** inferred the intent of the accused to invade the body of the victim from his actions:

On the evidence accepted, the Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that the [accused] took [the victim] and drove her to [his apartment] together with “Gaga”. The Trial Chamber accepts that [the victim] was raped there first by “Gaga” and two other men and then forced to have sexual intercourse with [the accused] because she had been threatened with death by “Gaga”. The Trial Chamber is satisfied beyond reasonable doubt that [the accused] had sexual intercourse with [the victim] in the full knowledge that she did not freely consent.⁶⁶

④ Victim statement

⑤ Witness statement

62 *Ibid.*, para. 763 (citations omitted).

63 *Ibid.*, para. 764 (citations omitted). For the typology of evidence, see ICTY, *The Prosecutor v. Jadranko Prlić, Bruno Vuković, Slobodan Prljak, Milivoj Petrović, Valentin Čorić and Berislav Pušić*, TC Judgement (Volume 2), Case No. IT-04-74-T, 29 May 2013, paras. 872, 978 (*P. v. Jadranko Prlić et al. TJ vol. 2*).

64 ICC, *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 4, para. 464 (citations omitted).

65 *Ibid.*, para. 551 (citations omitted).

66 ICTY, *P. v. Dragoljub Kunarac et al. TJ*, *supra* note 45, para. 647.

Evidence inferred from a circumstance

The ICC Trial Chamber in ***Katanga*** inferred that the perpetrators intended to invade the body of the victim from the circumstances of the events:

Ⓐ Victim statement

[T]he three persons who attacked [the victim] in Bogoro intentionally committed the crime of rape. In fact, it can be inferred from the circumstances of the events that the aforementioned subjective elements are established, as the men had the intention of engaging in sexual intercourse with the woman and were fully aware of the coercive environment in which she found herself.⁶⁷

[Consequence I] The perpetrator meant to cause the invasion of the body of a person [OR]

Evidence inferred from an utterance, a document or a deed

The ICTY Trial Chamber in ***Kunarac et al.*** inferred the intent of the accused to cause invasion from his actions:

Ⓐ Victim statement

Ⓑ Witness statement

The Trial Chamber finds that [the victims] were detained in [the accused's] apartment for about a week [...]. The Trial Chamber finds that the [accused] had sexual intercourse with the two women in the knowledge that they did not consent, and that he substantially assisted other soldiers in raping the two women. He did this by allowing other soldiers to visit his apartment and to rape the women or by encouraging the soldiers to do so, and by handing the girls over to other men in the knowledge that they would rape them and that the girls did not consent to the sexual intercourse. Finally, the Trial Chamber is satisfied that it has been proven beyond reasonable doubt that, after about a week, [the accused] handed the two women over to other soldiers whom he knew would most likely continue to rape and abuse them. [The accused] eventually sold [one victim] to an unidentified soldier, and handed over [the other victim] to [another person], in the almost certain knowledge that they would be raped again.⁶⁸

Evidence inferred from a circumstance

The ICTY Trial Chamber in ***Prlić et al.*** concluded that the perpetrators intended to sexually penetrate the victim and that they had knowledge that their acts were non-consensual:

Ⓐ Victim statement

Ⓓ Expert witness statement

Ⓔ Documentary evidence

The Chamber is [...] satisfied beyond any reasonable doubt that the HVO soldiers intended to have sexual relations with their victims knowing that the victims did not consent to them.⁶⁹

The Chamber is, moreover, satisfied that when they took the woman into a room, handcuffed her, took off her trousers and proceeded repeatedly and systematically to penetrate the victim sexually, the members of the HVO intended to penetrate her knowing that the victim had not given her consent.⁷⁰

67 ICC, *P. v. Germaine Katanga* T.J., *supra* note 56, para. 992 (citations omitted).

68 ICTY, *P. v. Dragoljub Kunarac et al.* T.J., *supra* note 45, para. 759.

69 ICTY, *P. v. Jadranko Prlić et al.* T.J. vol. 3, *supra* note 41, para. 761 (citations omitted).

70 *Ibid.*, para. 763 (citations omitted).

[T]he Chamber deems that the use of force and violence against [the victim] and the extreme humiliation she suffered at the time of the events and after [...] unquestionably show [...] that the soldiers intended to sexually penetrate the victim knowing that this penetration was non-consensual.⁷¹

[Consequence II] The perpetrator was aware that the invasion of the body of a person would occur in the ordinary course of events

Evidence inferred from an utterance, a document or a deed

The ICTY Trial Chamber in *Kunarac et al.* similarly inferred that the accused was aware that the invasion would occur in the ordinary course of events:

[The accused] would also invite his friends to his apartment, and he sometimes allowed them to rape one of the girls. [The accused] also sold three of the girls [...]. Prior to their being sold, [the accused] had given two of [them] to other Serb soldiers who abused them for more than three weeks before taking them back to [the accused], who proceeded to sell one and give the other away to acquaintances of his.⁷²

The Trial Chamber is also satisfied that [the accused] was aware of the gang-rape of [the victim] during her stay in the house. Firstly, the Trial Chamber accepts the evidence provided by [the victim] as to [the accused] entering the room while she was still being raped by “Bane” and telling her to get dressed because they had to go. Secondly, the [victims] as well as [the accused] in his statement [...] said that the sexual intercourse of [one victim] and [the accused] and the gang-rape of [the other victim] by a group of soldiers took place in adjacent rooms. The Trial Chamber is satisfied that Kunarac must have heard sounds caused by this incident. Thirdly, the fact that the accused Kunarac and “Gaga” took the girls to [his apartment] in concert makes it highly unlikely, and therefore incredible, that [the accused] would not have known that [the victim] was brought to the house for the purposes of rape, as was [the other victim].⁷³

The Trial Chamber is therefore satisfied [...] that [the accused] took [the victims] to [his apartment] for them to be raped. On this occasion, [the accused] personally had sexual intercourse with [one victim] in the knowledge that she did not consent and aided and abetted the gang-rape of [the other victim] at the hands of several of his soldiers by taking her to the house in the knowledge that she would be raped there and that she did not consent to the sexual intercourse.⁷⁴

- Ⓐ Victim statement
- Ⓑ Witness statement
- Ⓒ Accused statement

⁷¹ *Ibid.*, para. 764 (citations omitted).

⁷² ICTY, *P. v. Dragoljub Kunarac et al.*, *TI*, *supra* note 45, para. 587.

⁷³ *Ibid.*, para 651.

⁷⁴ *Ibid.*, para 653.

3.4. [*Mens rea* 2]

[Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent

No means of proof sourced from the dataset.

MEANS OF PROOF CHART: RAPE

ACTUS REUS 1

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight:

Of any part of the body of the victim or of the perpetrator with a sexual organ [OR]

Evidence of an invasion of any part of the body of the victim or of the perpetrator with a sexual organ

Evidence of forcing detainees to perform fellatio
 (A)(B)(C) *Mucić et al.* TJ, paras. 1065-1066

Evidence of penetration of victim's vagina with penis
 (A) *Furundžija* TJ, para. 87; *Bemba* TJ, paras. 464, 472, 551
 (B) *Furundžija* TJ, para. 87; *Bemba* TJ, paras. 481, 498
 (E) *Bemba* TJ, para. 498 (B) *Bemba* TJ, para. 464

Evidence of penetration of victim's anus with penis
 (A) *Furundžija* TJ, para. 87; *Bemba* TJ, paras. 498, 551
 (B) *Furundžija* TJ, para. 87 (E) *Bemba* TJ, para. 498

Evidence of penetration of victim's mouth with penis
 (A) *Furundžija* TJ, para. 87; *Bemba* TJ, paras. 498, 551
 (B) *Furundžija* TJ, para. 87 (E) *Bemba* TJ, para. 498

Evidence of medical and psychological consequences of the events
 (A) *Bemba* TJ, paras. 464, 472, 551

Evidence of semen leaking from victim's vagina or anus
 (B) *Bemba* TJ, para. 498

Of the anal or genital opening of the victim with any object or any other part of the body

Evidence of an invasion of the anal or genital opening with any object

Evidence of invasion of vagina with a piece of wood
 (B) *Akayesu* TJ, para. 686

Insufficient to prove: Evidence of cutting open victim's body including the vagina (B) *Muhimana* TJ, para. 557

Evidence of an invasion of the anal or genital opening with any other part of the body

No means of proof sourced from the dataset

MENS REA 1

[Conduct] The perpetrator meant to invade the body of a person

Evidence inferred from an utterance, a document or a deed
 (A)(B) *Kunarac et al.* TJ, para. 647

Evidence inferred from a circumstance
 (A) *Katanga* TJ, para. 992

[Consequence I] The perpetrator meant to cause the invasion of the body of a person [OR]

Evidence inferred from an utterance, a document or a deed
 (A)(B) *Kunarac et al.* TJ, para. 759

Evidence inferred from a circumstance
 (A)(B)(E) *Prić et al.* TJ vol III., paras. 761, 763, 764

[Consequence II] The perpetrator was aware that the invasion of the body of the person would occur in the ordinary course of events

Evidence inferred from an utterance, a document or a deed
 (A)(B)(C) *Kunarac et al.* TJ, paras. 587, 651, 653

ACTUS REUS 2

The invasion was committed:

By threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent

Evidence of fear of violence (or duress)

Evidence of verbal threats
 (A) *Akayesu* TJ, para. 430; *Kunarac et al.* TJ, paras. 219, 645

Evidence of threat with weapons
 (A) *Bemba* TJ, paras. 498, 551 (B) *Bemba* TJ, paras. 481, 498
 (E) *Bemba* TJ, para. 498

Evidence of detention/capivity

Evidence of detention in the accused's apartment
 (A)(B) *Kunarac et al.* TJ, para. 759

Evidence of formal detention (A)(B) *Mucić et al.* TJ, para. 958

Evidence of psychological oppression

Evidence of humiliation

(A) *Akayesu* TJ, para. 430 (B) *Akayesu* TJ, para. 437

Evidence of intimidation (A) *Kunarac et al.* TJ, para. 711

Evidence of abuse of power

Evidence of invasion by a camp commander
 (A)(B) *Mucić et al.* TJ, para. 958

Evidence of taking advantage of a coercive environment

Evidence of an armed offensive (A) *Katanga* TJ, paras. 989, 990

Evidence of absence of consent or voluntary participation

Evidence of circumstances of incidents
 (A)(B)(E) *Prić et al.* TJ vol III., paras. 761, 763, 764

Evidence of existence of coercive circumstances
 (A) *Muhimana* TJ, paras. 319, 322

Evidence of circumstances of detention (A)(B) *Kunarac et al.* TJ, para. 132

Evidence of incapacity to give genuine consent

Evidence of unconsciousness of the victim during the invasion
 (A) *Bemba* TJ, paras. 464, 551

MENS REA 2

[Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent

No means of proof sourced from the dataset

TYPOLOGY OF EVIDENCE

- (A) Victim statement
- (B) Witness statement
- (C) Accused statement
- (D) Expert witness statement
- (E) Documentary evidence
- (F) Medical records
- (G) Forensic evidence
- (H) Physical evidence
- (I) Phone, audio and video materials
- (J) Digital evidence
- (K) Maps, geo-location, building structure
- (L) Statistical data
- (M) Contextual data
- (N) Evidence not capable of satisfying the component

4

4. Sexual slavery 40

- 4.1. [Actus reus 1] The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty 42
- 4.2. [Actus reus 2] The perpetrator caused such person or persons to engage in one or more acts of a sexual nature 48
- 4.3. [Mens rea 1] 52
- [Conduct] The perpetrator meant to exercise powers attached to the right of ownership over one or more persons
- 4.4. [Mens rea 2] 52
- [Conduct] The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature
- [Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]
- [Consequence II] The perpetrator was aware that such person or persons would engage in acts of a sexual nature in the ordinary course of events

4. Sexual slavery

Legal requirements and components of sexual slavery under the ICC Statute			
Actus reus 1	The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty	<p>Exercise of the right of ownership</p> <p>Impossibility of the person to take decisions voluntarily</p> <p>Exercise of all types of control over the person</p> <p>Use or threat of violence</p> <p><i>[It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children (EoC Art. 7(1)(g)-2, footnote 18).]</i></p>	
Actus reus 2	The perpetrator caused such person or persons to engage in one or more acts of a sexual nature	<p>Causation by the perpetrator</p> <p>Engagement in acts of a sexual nature</p> <p>Acts of a sexual nature</p>	
Mens rea 1	Conduct	The perpetrator meant to exercise powers attached to the right of ownership over one or more persons	
Mens rea 2	Conduct	The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature	
	Consequence	<p>[Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]</p> <p>[Consequence II] The perpetrator was aware that such person or persons would engage in acts of a sexual nature in the ordinary course of events</p>	
Possible charges for sexual slavery under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Sexual slavery	-	Sexual slavery (ICC Art. 7(1)(g))	Sexual slavery (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm	Enslavement Other inhumane acts	-

Table 9. Actus reus and mens rea of, and possible charges for, sexual slavery under the ICC Statute.

4.1. [Actus reus 1] The perpetrator exercised any or all of the powers attached to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty

Exercise of the right of ownership

Evidence of exercise of any or all the powers attached to the rights of ownership

The ICTY Trial Chamber in *Kunarac et al.* accepted evidence that the victims could not leave, despite a lack of physical restraints:

- Ⓐ Victim statement
- Ⓑ Witness statement

The Trial Chamber further accepts that the [victims] were not free to go where they wanted to, even if, as [one victim] admitted, they were given the keys to the house at some point. [T]he Trial Chamber accepts that the girls, as described by [one victim], had nowhere to go, and had no place to hide from [the accused] and DP 6, even if they had attempted to leave the house.⁷⁵

The Chamber further found the accused to have exercised ownership through lending the victims to his friends, within the confines of his apartment:

- Ⓐ Victim statement
- Ⓑ Witness statement

[The accused] would also invite his friends to his apartment, and he sometimes allowed them to rape one of the girls.⁷⁶

Moreover, the Chamber described actions that indicate the trading of a person:

- Ⓐ Victim statement
- Ⓑ Witness statement

[The accused] also sold three of the girls [...]. Prior to their being sold, [the accused] had given two of [them] to other Serb soldiers who abused them for more than three weeks before taking them back to [the accused], who proceeded to sell one and give the other away to acquaintances of his.⁷⁷

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

The SCSL Trial Chamber in *Brima et al.* accepted evidence of the proof of ownership to include physical labour and domestic activities, as well as referring to the victim as their wife:

- Ⓐ Victim statement
- Ⓑ Witness statement
- Ⓔ Documentary evidence

The Trial Chamber finds that the totality of the evidence adduced by the Prosecution as proof of “forced marriage” goes to proof of elements subsumed by the crime of sexual slavery. [...] The evidence showed that the relationship of the perpetrators to their “wives” was one of ownership and involved the exercise of control by the perpetrator over the victim, including control of the victim’s sexuality, her movements and her labour; for example, the “wife” was expected to carry the

⁷⁵ ICTY, *P. v. Dragoljub Kunarac et al. T.I.*, *supra* note 45, para. 740.

⁷⁶ *Ibid.*, para. 587.

⁷⁷ *Ibid.*

rebel's possessions as they moved from one location to the next, to cook for him and to wash his clothes. Similarly, the Trial Chamber is satisfied that the use of the term "wife" by the perpetrator in reference to the victim is indicative of the intent of the perpetrator to exercise ownership over the victim, and not an intent to assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband wife relationship.⁷⁸

The same Chamber accepted evidence of deprivation of liberty to establish the exercise of the right of ownership within a military camp:

The Chamber recalls [victim`s] testimony that after she had fled her home and hidden in the bush, armed men captured her in the immediate aftermath of the attack. After brutally raping her, they took her to a military camp. The witness was held there, in a hole dug in the ground, for several days [...]. At the behest of the camp commander, to whom it fell to decide her fate, [the victim] was forced to live behind his house. [...] The Chamber recalls that [the victim] considered herself a hostage and wanted to escape the camp but was afraid to disobey her commander's orders.⁷⁹

Ⓐ Victim statement

Ⓑ Witness statement

In this connection, the Chamber also draws on the testimony of [...] an eyewitness who corroborated that [the victim] was captured in Bogoro in the aftermath of battle, was then taken by combatants to the very camp where he stated she was imprisoned [...]. [Another witness] provided corroboration, through hearsay evidence, of [the victim`s] abduction and stated that he had learnt that combatants had taken women hostage during the 24 February attack and taken them to that camp, where they were incarcerated.⁸⁰

The ICC Trial Chamber in *Katanga* considered the language used to describe victim's status to be a factor in determining the existence of a coercive environment:

The Chamber is of the view that in the specific context of the immediate aftermath of the attack on Bogoro, the statement that someone was "taken as a wife" by a combatant or that she was to "become his wife" is a clear reference to a coercive environment entailing almost certain engagement in acts of a sexual nature. [One victim] made her plight most clear: "[...] You know full well that when someone takes you for his wife, he can have sexual intercourse whenever and however he wishes. He told me that I had become his wife. I could not refuse". She stated that when the combatants raped her for the first time in the bush, she immediately thought: "[...] So, I have become their wife."⁸¹

Ⓐ Victim statement

The same Chamber described the *forced marriage* of victims as evidence that the perpetrators exercised a right of ownership over the victims by considering them to be their personal property:

[T]he combatants allotted themselves [the victim] and two other women [...]. Two of them disagreed over who would have [the victim], before deciding to share her as

Ⓐ Victim statement

78 SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, TC II, Judgement, Case No. SCSL-2004-16-T, 20 June 2007, para. 711 ('P. v. Alex Tamba Brima et al. TJ').

79 ICC, *P. v. Germaine Katanga TJ*, *supra* note 56, para. 1002 (citations omitted).

80 *Ibid.*, para. 1003 (citations omitted).

81 *Ibid.*, para. 1000 (citations omitted).

their wife. After being beaten and held captive in Bogoro, the [victim] was forced to follow the combatants and transport the property they had just appropriated [...].⁸²

[C]ombatants from the camp where [the victim] was kept wielded powers over her attaching to the right of ownership [...]: the witness did not have freedom of movement, nor was she able to decide where she lived, and she in fact belonged to the camp combatants. [T]he man who became her “husband” was given [the victim] and exercised powers over her attaching to the right of ownership. It can thus be established from the available evidence that this state of enslavement lasted over a year and a half.⁸³

Evidence of benefit to the perpetrator

The ICTY Trial Chamber in *Kunarac et al.* accepted proof of monetary payment for a person as evidence of benefit to the perpetrator:

- Ⓐ Victim statement
- Ⓑ Witness statement

The day after they had returned, [the victims] were taken from [the accused’s] apartment. [One victim] was taken by a man called “Dragec”, who gave [the accused] 200 Deutschmarks in the process.⁸⁴

The same Chamber found that victims were forced to carry out various domestic responsibilities during their enslavement:

- Ⓐ Victim statement
- Ⓑ Witness statement

While they were detained in [accused’s] apartment, the girls were required to take care of the household chores, the cooking and the cleaning.⁸⁵

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

The ICC Trial Chamber in *Katanga* also found evidence of forced undertaking of various chores:

- Ⓐ Victim statement
- Ⓑ Witness statement

During and after her incarceration in the camp prison, where the living conditions were particularly harsh, she was forced to carry out household chores, including assisting the combatants’ wives in their daily activities.⁸⁶

⁸² *Ibid.*, para. 1014 (citations omitted).

⁸³ *Ibid.*

⁸⁴ ICTY, *P. v. Dragoljub Kunarac et al. TJ*, *supra* note 45, para. 756.

⁸⁵ *Ibid.*, para. 751.

⁸⁶ ICC, *P. v. Germaine Katanga TJ*, *supra* note 56, para. 1002 (citations omitted).

Impossibility of the person to take decisions voluntarily

Evidence of absence of free will or real choice when taking decision

The SCSL Trial Chamber in **Sesay et al.** considered that the abduction and rape of the victim established coercive circumstances that removed the free will or choice of the victim:

④ Victim statement

The Chamber recalls [the victim’s] testimony that she was abducted from Masingbi in Tonkolili District at age 10 and taken to Buedu in Kailahun District where she lived from 1994 to 1998. The Chamber concludes from her evidence that she was raped twice before being “married” to a rebel Commander in Buedu. [...] The Chamber is satisfied that [the victim] remained as the “wife” of the Commander as she feared that, if she were to escape, she could be captured and fall into the hands of Kamajors who would kill her because she came from a rebel zone. The Chamber finds that [the victim] did not consent to her “marriage” and that, moreover, genuine consent was not possible in such coercive circumstances.⁸⁷

The ICC Trial Chamber in **Katanga** considered the conditions of the victim’s forced marriage which indicate the absence of free will or choice:

④ Victim statement

[The victim] stated that, on the orders of the “[...] superior”, she was compelled to marry a militia member living at the camp, live with him and follow him when he was reassigned to other Ngiti camps. The witness claimed that she feared him and that she had thought about how she might escape but was unable to do so [...].⁸⁸

The same Chamber considered that the absence of free will or choice of the victim in taking decisions led to extreme vulnerability of the victim:

④ Victim statement

[The victim] who was held at the camp, was extremely vulnerable. She did not have freedom of movement, nor was she able to decide where she lived, and she in fact belonged to the camp combatants. [T]he man who became her “husband” was given [the victim] and exercised powers over her attaching to the right of ownership.⁸⁹

Exercise of all types of control over the person

Evidence of exercise of control – physical or psychological – over the person

The ICTY Trial Chamber in **Kunarac et al.** found that the accused controlled the victims’ movements, privacy and labour:

④ Victim statement

[The accused] detained [two victims] for about a week, and [other two victims] for about four months in his apartment, by locking them up and by psychologically imprisoning them, and thereby depriving them of their freedom of movement. During that time, he had complete control over their movements, privacy and labour. He made them cook for him, serve him and do the household chores for

87 SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, TC I, Judgement, Case No. SCSL-04-15-T, 2 March 2009, (*P. v. Issa Hassan Sesay et al.* TJ), para. 1460 (citations omitted).

88 ICC, *P. v. Germaine Katanga* TJ, *supra* note 56, para. 1004 (citations omitted).

89 *Ibid.*, para. 1007 (citations omitted).

him. He subjected them to degrading treatments, including beatings and other humiliating treatments.⁹⁰

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

The SCSL Trial Chamber in *Brima et al.* reached a similar conclusion, using testimonies and secondary data gathered in an expert report:

- (A) Victim statement
- (B) Witness statement
- (E) Documentary evidence

The evidence showed that the relationship of the perpetrators to their “wives” was one of ownership and involved the exercise of control by the perpetrator over the victim, including control of the victim’s sexuality, her movements and her labour; for example, the “wife” was expected to carry the rebel’s possessions as they moved from one location to the next, to cook for him and to wash his clothes.⁹¹

The same Chamber also considered that the absence of physical or mental trauma from victims of forced marriages precluded findings of sexual slavery:

- (19) Judges deliberations

The Prosecution evidence in the present case does not point to even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery. Not one of the victims of sexual slavery gave evidence that the mere fact that a rebel had declared her to be his wife had caused her any particular trauma, whether physical or mental. Moreover, in the opinion of the Trial Chamber, had there been such evidence, it would not by itself have amounted to a crime against humanity, since it would not have been of similar gravity to the acts referred to in Article 2(a) to (h) of the Statute.⁹²

The ICC Trial Chamber in *Katanga* found that the exercise of control extended to include restricting the victim’s activities to the performance of sexual intercourse:

- (A) Victim statement

The men whose wife [the victim] had become ensured that she could not escape. One of them even controlled her daily life to such a degree that he wanted the only activity she performed to be sexual intercourse with him. The Chamber notes that [the victim] saw no means of escape, as she was convinced that she would be recaptured and killed.⁹³

90 ICTY, *P. v. Dragoljub Kunarac et al. T.J.*, *supra* note 45, para. 780.

91 SCSL, *P. v. Alex Tamba Brima et al.* *supra* note 78, para. 711 (citations omitted), referring to victim and witness statements and the “Expert Report on the Phenomenon of ‘Forced Marriages’ in the Context of the Conflict in Sierra Leone and, more specifically, in the Context of the Trials against the RUF and AFRC Accused Only”.

92 *Ibid.*, para. 710.

93 ICC, *P. v. Germaine Katanga T.J.* *supra* note 56, para. 1015 (citations omitted).

Evidence of elements showing how control has been applied

The ICTY Trial Chamber in ***Kunarac et al.*** accepted evidence of the accused's assertion of exclusivity over the victim whilst she was kept in his house, by forbidding other soldiers to rape her:

Ⓐ Victim statement

The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that [the victim] was raped by [the accused] [...], continuously and constantly whilst kept in the house in Trnovace. Kunarac in fact asserted his exclusivity over [the victim] by forbidding any other soldier to rape her.⁹⁴

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

The ICC Pre-Trial Chamber in ***Ongwen*** accepted the victim's testimony that she was beaten when she refused to have sexual intercourse with the accused:

Ⓐ Victim statement

The day she was abducted, [the accused] forced her to become his so-called "wife" and continued to have sex with her by force repeatedly until her escape. She was beaten when she refused to have sex with him, and at no time was she able to escape.⁹⁵

Use or threat of violence

Evidence of use of force, threat of force or coercion during enslavement

The ICTY Trial Chamber in ***Kunarac et al.*** admitted evidence of the use of force and threats of physical violence:

Ⓐ Victim statement

Ⓑ Witness statement

[The victim] stayed in [the accused's] apartment for about a month or two. [One of the occupants of the apartment] would rape her anytime he wanted, orally and vaginally, and she had no choice but to comply with his demands; he would also sometimes beat her and once threatened to cut her throat. Both women had to obey every command, because the two men were armed at all times with knives, rifles or pistols. The apartment was locked and there was no access to the outside world.⁹⁶

The Trial Chamber is also satisfied that, while kept in [the accused's] apartment, these girls were constantly raped, humiliated and degraded. They were sometimes beaten, slapped or threatened by one of the occupants of the apartment. The [accused] once slapped [a victim] because she refused to sleep with a soldier whom

94 ICTY, *P. v. Dragoljub Kunarac et al.* TJ, *supra* note 45, para. 741 (citations omitted).

95 ICC, *The Prosecutor v. Dominic Ongwen*, PTC II, Decision on the confirmation of charges against Dominic Ongwen, Case No. ICC-02/04-01/15-422-Red, 23 March 2016, para. 111 (*P. v. Dominic Ongwen* DCC).

96 ICTY, *P. v. Dragoljub Kunarac et al.* TJ, *supra* note 45, para. 210 (citations omitted).

he had brought in. Twelve-year old [victim] was sent in her place. [The accused] also beat [another victim] up on other occasions.⁹⁷

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

Similar means of proof

Rape / Actus reus 2 / Evidence of use of physical force, pp. 26-27

/ Evidence of fear of violence (or duress), pp. 28-29

/ Evidence of psychological oppression, pp. 29-30

4.2. [Actus reus 2] The perpetrator caused such person or persons to engage in one or more acts of a sexual nature

Causation by the perpetrator

Evidence of perpetrator directly causing the person to engage in acts of a sexual nature

The ICTY Trial Chamber in *Kunarac et al.* accepted that the accused raped the victim himself and assisted another person:

④ Victim statement

The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that, while in [the accused's] apartment, [the victim] was raped by both [the accused] and [other occupant of the apartment]. [The accused] reserved [the victim] for himself and raped her almost every night he spent in the apartment. [The other occupant of the apartment] constantly raped [another victim], and he took advantage of [the accused's] absence to rape [the first victim] too. [The other occupant of the apartment] could rape [the victim] because she was held by [the accused] in his apartment. [The accused] therefore also substantially assisted [the other occupant of the apartment] in raping [the victim], by allowing [him] to stay in his apartment and to rape [the victim] there.⁹⁸

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

⁹⁷ *Ibid.*, para. 749.

⁹⁸ *Ibid.*, para. 761 (citations omitted).

Similar means of proof

Enforced prostitution / *Actus reus* 1 / Evidence of perpetrator directly causing the person to engage in acts of a sexual nature, p. 60

Evidence of perpetrator placing victims in a situation where acts of a sexual nature would occur

The ICC Trial Chamber in ***Katanga*** found evidence of forced marriage and rape sufficient to prove that a perpetrator compelled one or more victims to engage in acts of a sexual nature:

- Ⓐ Victim statement
- Ⓑ Witness statement

[T]he status of “[...] wife” thus imposed upon [the victim] meant that sexual favours could be obtained from her. As she herself stated, the only task assigned to her was to have sexual intercourse with her two “[...] husbands”. [...] The Chamber notes here that the young woman was repeatedly raped over a period of about three months, initially by two men and subsequently by just one of them.⁹⁹

Engagement in acts of a sexual nature

Evidence that victims were forced to passively engage in acts of a sexual nature with perpetrator

The ICC Trial Chamber in ***Katanga*** accepted evidence that victims were forcibly raped by more than one perpetrator:

- Ⓐ Victim statement

Concerning the second material element, the Chamber notes that [the victim] was raped several times by combatants during the attack on Bogoro, at the military camp and, more generally, in captivity. It further notes that she was repeatedly assaulted, at times by several combatants in turn whilst she was incarcerated, causing her serious mental and physical harm. The Chamber notes, too, that whilst she was captive she would sometimes be taken under threat into the bush by men in order to abuse her. The witness was subsequently regularly raped by the man who had taken her as his wife and, on occasion, by another combatant.¹⁰⁰

Evidence that victims were forced to actively engage in acts of a sexual nature with the perpetrator

The ICTY Trial Chamber in ***Kunarac et al.*** found evidence that the victim was forced to actively engage in acts of a sexual nature with the perpetrator:

- Ⓐ Victim statement
- Ⓒ Accused statement

The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that [the victim] subsequently also had sexual intercourse with [the accused] in which she took an active part by taking of the trousers of the accused and kissing him all over the body before having vaginal intercourse with him. The [accused]

⁹⁹ ICC, *P. v. Germaine Katanga*, *supra* note 56, para. 1016 (citations omitted).

¹⁰⁰ *Ibid.*, para. 1006 (citations omitted).

admitted having had intercourse with [the victim] in [the accused’s apartment] on this occasion, during his interview with the Prosecution.¹⁰¹

The Trial Chamber, however, accepts the testimony of [the victim], who testified that, prior to the intercourse, she had been threatened by “Gaga” that he would kill her if she did not satisfy the desires of his commander, [the accused]. The Trial Chamber accepts [the victim’s] evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by “Gaga” if she did not do so.¹⁰²

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

Evidence that victims were forced to actively engage in acts of a sexual nature with each other

The ICTY Trial Chamber in ***Kunarac et al.*** accepted victim testimony concerning forced acts of dancing as well as stripping by more than one victim:

[The victim] testified, and the Trial Chamber accepts, that, on one of these occasions, the four girls [...] were made to dance on a table while [the accused] and [the other occupant of the apartment] were watching and pointing weapons at them.¹⁰³

Ⓐ Victim statement

[Another victim] testified, and the Trial Chamber accepts, that she, together with [two other victims], were once made to strip and dance. [The accused, the other occupant of the apartment] and possibly a third soldier watched them. Although she did not recall [one of the victims] being present, [the victim’s] testimony fully supports [the above] evidence of these events.¹⁰⁴

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

101 ICTY, *P. v. Dragoljub Kunarac et al. T.I.*, *supra* note 45, para. 644.

102 *Ibid.*, para. 645.

103 *Ibid.*, para. 768.

104 *Ibid.*, para. 769.

Acts of a sexual nature

Evidence of rape

Similar means of proof

Rape / *Actus reus* 1 / pp. 24-26

Sexual slavery / *Actus reus* 2 / Evidence of perpetrator directly causing the person to engage in acts of a sexual nature, p. 48

/ Evidence of perpetrator placing victims in a situation where acts of a sexual nature would occur, p. 48

/ Evidence that victims were forced to passively engage in acts of a sexual nature with the perpetrator, p. 49

Evidence of other acts of a sexual nature

Similar means of proof

Sexual slavery / *Actus reus* 2 / Evidence that the victims were forced to actively engage in acts of a sexual nature with each other, p. 50

Other forms of sexual violence / *Actus reus* 1 / Evidence that the perpetrator sexually molested one or more persons, pp. 90-91

/ Evidence that the perpetrator mutilated a person or person's sexual characteristics, pp. 91-92

/ Evidence that the victim was subjected to sexual verbal abuse, p. 92

/ Evidence that the perpetrator subjected one or more persons to forced nudity, p. 92

Evidence of the results of sexual acts¹⁰⁵

The ICC Trial Chamber in *Katanga* was satisfied that the perpetrator caused acts of a sexual nature, due to the pregnancy of the victim:

④ Victim statement

[The victim] was raped several times by combatants during the attack on Bogoro, at the military camp and, more generally, in captivity. [A]fter her escape, the witness gave birth to a child who can only have been conceived whilst she was in captivity.¹⁰⁶

¹⁰⁵ For similar means of proof, see 'Engagement in acts of a sexual nature' on pp. 48-9.

¹⁰⁶ ICC, *P. v. Germaine Katanga T.I*, *supra* note 56, para. 1006 (citations omitted).

4.3. [Mens rea 1]

[Conduct] The perpetrator meant to exercise powers attached to the right of ownership over one or more persons

Evidence inferred from a circumstance

The ICTY Trial Chamber in *Kunarac et al.* inferred the intent of the accused from the circumstances:

Ⓐ Victim statement

For all practical purposes, he possessed them, owned them and had complete control over their fate, and he treated them as his property. The Trial Chamber is also satisfied that [the accused] exercised the above powers over the girls intentionally. The Trial Chamber is satisfied that many of the acts caused serious humiliation, of which the accused was aware.¹⁰⁷

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

Evidence inferred from an utterance, a document or a deed

The SCSL Trial Chamber in *Brima et al.* considered that the language used to refer to the victim suggested the intent of the accused:

Ⓐ Victim statement
Ⓑ Witness statement
Ⓔ Documentary evidence

[T]he Trial Chamber is satisfied that the use of the term “wife” by the perpetrator in reference to the victim is indicative of the intent of the perpetrator to exercise ownership over the victim, and not an intent to assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband wife relationship.¹⁰⁸

4.4. [Mens rea 2]

[Conduct] The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature

Evidence inferred from a circumstance

The ICC Trial Chamber in *Katanga* inferred the intent and knowledge of the perpetrators from the situations in which they placed the victims:

Ⓐ Victim statement

[T]he fact that the combatants declared that the civilians captured in Bogoro and brought to their camps were “their wives” does show they all harboured the

¹⁰⁷ ICTY, *P. v. Dragoljub Kunarac et al. T.I.*, *supra* note 45, para. 781.

¹⁰⁸ SCSL, *P. v. Alex Tamba Brima et al. T.I.*, *supra* note 78, para. 711 (citations omitted).

intention to treat the victims as if they owned them and obtain sexual favours from them.¹⁰⁹

The perpetrators of these repeated rapes could not have been oblivious to the fact that whilst at the camp, [the victim] was deprived of all freedom of movement. They deliberately forced her to perform acts of a sexual nature. In this connection, the first man who raped her at the camp explained to her that she was now his wife and, to ensure she understood clearly what he meant by “wife”, told her that he wanted her body, pushed her onto the bed and raped her as she cried.¹¹⁰

[T]he combatants who raped [the victim] deliberately forced her to have sexual intercourse with them. Moreover, they were aware that the witness, who had lived in captivity in their camp for a long period, had no freedom of movement. This held true, in particular, for the men who raped her during her incarceration and for the man who made her his wife. He could not have been unaware that he wielded power over her such that she was in reality entirely under his control. Thus, for instance, when [the victim] resisted his advances, he told her that he would make her his wife regardless, as the camp commander, it is alleged, so ordered subsequently. It would therefore appear proven that these combatants intentionally committed the crime of sexual slavery and that the requirements of article 30 of the Statute have been met.¹¹¹

Similar means of proof

Other forms of sexual violence / *Mens rea 1* / Conduct, p. 95

[Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]

No means of proof sourced from the dataset.

Similar means of proof

Other forms of sexual violence / *Mens rea 2* / Consequence I, p. 96

¹⁰⁹ ICC, *P. v. Germaine Katanga* T1, *supra* note 56, para. 1001 (citations omitted).

¹¹⁰ *Ibid.*, para. 1018 (citations omitted).

¹¹¹ *Ibid.*, para. 1008 (citations omitted).

[Consequence II] The perpetrator was aware that such person or persons would engage in acts of a sexual nature in the ordinary course of events

Evidence inferred from an utterance, a document or a deed

The ICTY Trial Chamber in *Kunarac et al.* inferred the intent of the accused from his actions:

④ Victim statement

[The accused] would also invite his friends to his apartment, and he sometimes allowed them to rape one of the girls. [The accused] also sold three of the girls [...]. Prior to their being sold, [the accused] had given two of [them] to other Serb soldiers who abused them for more than three weeks before taking them back to [the accused], who proceeded to sell one and give the other away to acquaintances of his.¹¹²

The [accused] knew of the attack against the Muslim civilian population, and he also perpetuated it by prolonging the ordeal of these girls by selling or giving them to men whom he knew would rape them and abuse them.¹¹³

Alternative charge

Crimes against humanity/ Enslavement [ICTY Art. 5(c)]

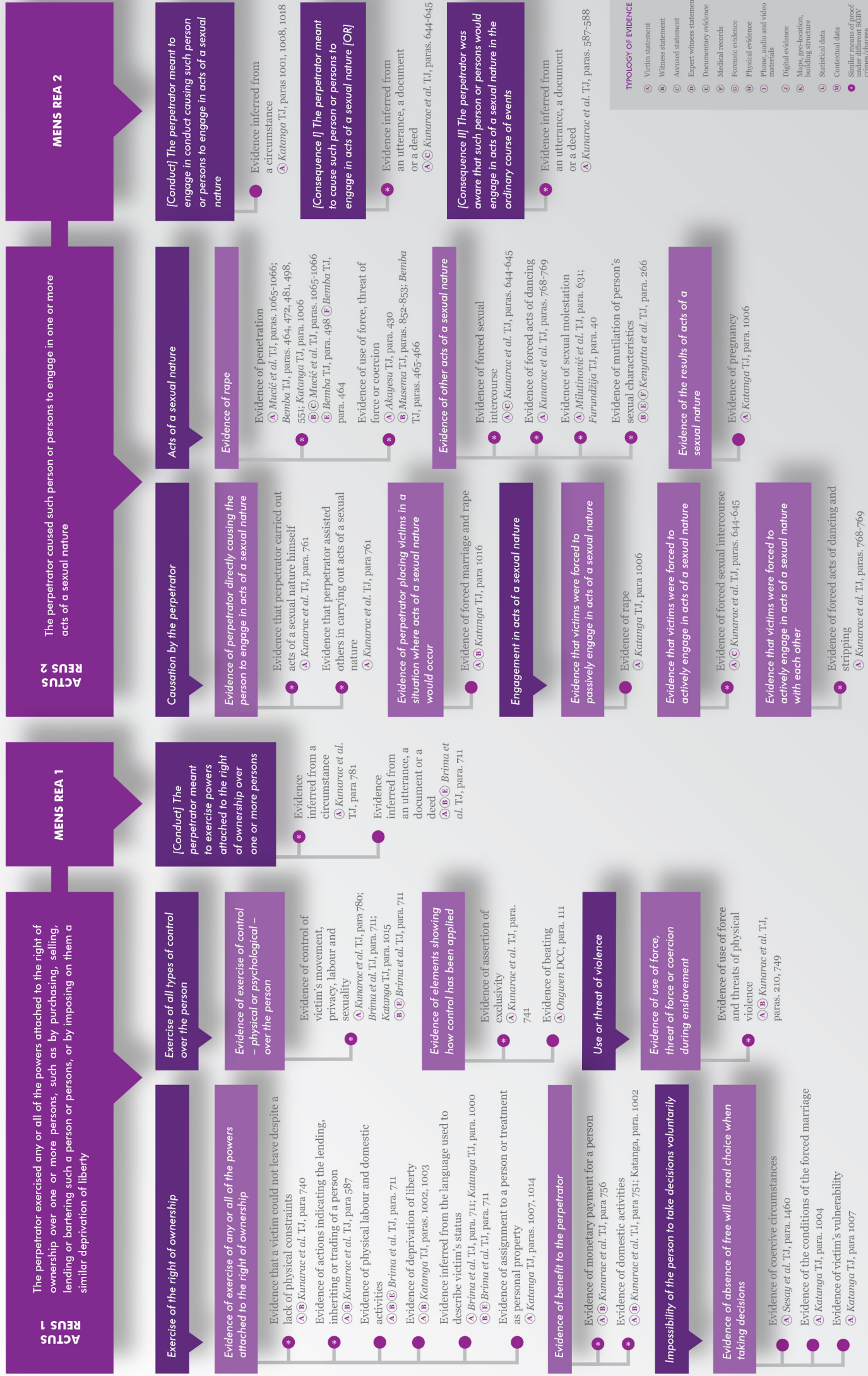
Similar means of proof

Other forms of sexual violence / *Mens rea* 2 / Consequence II, p. 96

¹¹² ICTY, *P. v. Dragoljub Kunarac et al.* T.J., *supra* note 45, para. 587.

¹¹³ *Ibid.*, para. 588.

MEANS OF PROOF CHART: SEXUAL SLAVERY



5

5. Enforced prostitution 58

- 5.1. [Actus reus 1] The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment of such person or persons' incapacity to give genuine consent 60
- 5.2. [Actus reus 2] The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature 63
- 5.3. [Mens rea 1] 64
- [Conduct] The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature
- [Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]
- [Consequence II] The perpetrator was aware that such person or persons would engage in acts of a sexual nature in the ordinary course of events
- [Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent
- 5.4. [Mens rea 2] 65
- [Consequence I] The perpetrator meant to obtain or expected to obtain pecuniary or other advantage [OR]
- [Consequence II] The perpetrator was aware that he/she or another person would obtain or expected to obtain pecuniary or other advantage
- [Circumstance] The perpetrator was aware that another person obtained or expected to obtain pecuniary or other advantage

5. Enforced prostitution

Legal requirements and components of enforced prostitution under the ICC Statute		
Actus reus 1	<p>The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment or such person's incapacity to give genuine consent</p>	<p>The perpetrator caused one or more persons to engage in an act of a sexual nature</p> <p>The perpetrator's or victim's acts of a sexual nature occurred through force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent</p>
	Actus reus 2	<p>The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature</p>
Mens rea 1	Conduct	The perpetrator meant to engage in the conduct of causing one or more persons to engage in one or more acts of a sexual nature
	Consequence	<p>[Consequence I] The perpetrator meant to cause one or more persons to engage in acts of a sexual nature [OR]</p> <p>[Consequence II] The person was aware that one or more persons would engage in one or more acts of a sexual nature in the ordinary course of events</p>
	Circumstance	The perpetrator was aware of use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent
Mens rea 2	Consequence	<p>[Consequence I] The perpetrator meant to obtain or expected to obtain pecuniary or other advantage [OR]</p> <p>[Consequence II] The perpetrator was aware that he/she or another person would obtain or expected to obtain pecuniary or other advantage</p>
	Circumstance	The perpetrator was aware that another person obtained or expected to obtain pecuniary or other advantage

Possible charges for enforced prostitution under the ICC Statute

	Genocide	Crimes against humanity	War crimes
Enforced prostitution	-	Enforced prostitution (ICC Art. 7(1)(g))	Enforced prostitution (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm	Sexual slavery Enslavement Other inhumane acts	Rape

Table 10. *Actus reus* and *mens rea* of, and possible charges for, enforced prostitution under the ICC Statute.

5.1. [Actus reus 1] The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment of such person or persons' incapacity to give genuine consent

The perpetrator caused one or more persons to engage in an act of a sexual nature

Evidence of perpetrator directly causing the person to engage in acts of a sexual nature

The Netherlands Temporary Court-Martial at Batavia in **Case No. 76** established that the accused forced victims into acts of prostitution:

- Ⓐ Victim statement
- Ⓒ Accused statement

[The accused] rented a block of houses and opened a brothel to which a restaurant and a bar were attached. The place was known as the Sakura Club and was exclusively reserved for Japanese civilians. His assistant in the brothel business was a woman [...] with whom he had lived since 1943. With her help, girls were engaged to serve in the restaurant or in the bar as waitresses and then gradually forced to commit acts of prostitution with the customers.¹¹⁴

Similar means of proof

Sexual slavery / *Actus reus 2* / Evidence of perpetrator directly causing the person to engage in acts of a sexual nature, p. 48

¹¹⁴ Netherlands Temporary Court-Martial at Batavia, *Case No. 76*, Trial of Washio Awochi, Judgement delivered on 25 October 1946, as cited by UNWCC in *Law Reports of Trials of War Criminals*, 1 November 1997, p. 122 ('Case No. 76').

Evidence of perpetrator placing victims in a situation where acts of a sexual nature would occur

No means of proof sourced from the dataset.

Similar means of proof

Sexual slavery / *Actus reus 2* / Evidence of perpetrator placing victims in a situation where acts of a sexual nature would occur, p. 48

The perpetrator's or victim's acts of a sexual nature occurred through force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent

Evidence of use of force

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** accepted evidence that the perpetrator used physical force on one or more persons:

- Ⓐ Victim statement
- Ⓒ Accused statement

In all cases the girls wished to leave the place either when put under pressure to become prostitutes or a certain time after having started this activity. They were not allowed to do so. All were threatened [...], and some were even severely beaten.¹¹⁵

Evidence of absence of consent or voluntary participation

No means of proof sourced from the dataset.

Evidence of punishment

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** accepted evidence that punishment occurred in the form of deportation:

- Ⓐ Victim statement

In several instances girls who persisted in asking to leave were delivered to the police and deported to other districts.¹¹⁶

Evidence of fear of violence (or duress)

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** further documented use of threats with police measures to force victims into prostitution:

- Ⓐ Victim statement

Threats with police measures were, in some instances, used at the stage of inducing the girls to become waitresses. In all cases the girls wished to leave the place

¹¹⁵ *Ibid.*, p. 123.

¹¹⁶ *Ibid.*

either when put under pressure to become prostitutes or a certain time after having started this activity. They were not allowed to do so. All were threatened with the Japanese police, that is with imprisonment or deportation.¹¹⁷

When they wished to leave the brothel, women and girls “were threatened with the Kempci” (Japanese military police), which threats, in view of the nature of the Japanese police, “were rightly considered as being synonymous with ill-treatment, loss of liberty or worse”.¹¹⁸

Evidence of detention/captivity

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** referred to evidence of captivity:

Ⓐ Victim statement | Women and girls “intended for prostitution had to take up residence in a part of the club shut off for that purpose and from which they were not free to move”.¹¹⁹

Evidence of psychological oppression

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** considered the seriousness of threats to show psychological oppression of victims:

Ⓐ Victim statement | The threats were “of such a serious character” that “the women and girls were forced through them to give themselves to the Japanese visitors of the Sakura Club against their will.”¹²⁰

Evidence of abuse of power

| No means of proof sourced from the dataset.

Evidence of taking advantage of a coercive environment

| No means of proof sourced from the dataset.

Similar means of proof

Rape / *Actus reus* 2, pp. 26-33

117 *Ibid.*

118 *Ibid.*, p. 124.

119 *Ibid.*

120 *Ibid.*

Evidence of incapacity to give genuine consent

The Netherlands Court-Martial at Batavia in the **Case No. 76** accepted evidence of incapacity through misrepresentation, force or coercion:

Ⓐ Victim statement

[G]irls were engaged to serve in the restaurant or in the bar as waitresses and then gradually forced to commit acts of prostitution with the customers. In most cases, when accepting to serve in the restaurant or bar, the girls were unaware of the existence of the brothel. In other cases they knew of it, but made specific arrangements that they would have nothing to do with it.¹²¹

Furthermore, the Court considered the juvenile status of victims as a further indicator of their incapacity:

Ⓐ Victim statement

Among those who were thus forced to prostitution were girls of 12 and 14 years of age.¹²²

Ⓑ Witness statement

5.2. [Actus reus 2] The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature

The perpetrator obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of sexual nature [OR]

Evidence of monetary payment or payment in goods for a person or their services

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** established that the accused obtained monetary payment for the victim's services:

Ⓐ Victim statement

Some girls were required to earn a minimum of 450 guilders per evening, and thus to receive at least three visitors. No girl was allowed to receive less than two visitors every night.¹²³

[T]he accused "drew a very good income" from the club and the girls "were forced to work very hard in order to make the takings as high as possible."¹²⁴

Similar means of proof

Sexual slavery / Actus reus 1 / Exercise of the right of ownership / Evidence of benefit to the perpetrator, p. 44

¹²¹ *Ibid.*, pp. 122-123.

¹²² *Ibid.*, p. 123.

¹²³ *Ibid.*

¹²⁴ *Ibid.*, p. 125.

Another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of sexual nature*Evidence that another person obtained or expected to obtain pecuniary or other advantage*

No means of proof sourced from the dataset.

5.3. [Mens rea 1]**[Conduct] The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature***Evidence inferred from an utterance, a document or a deed*

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** found evidence that the accused ordered acts of a sexual nature:

Ⓐ Victim statement
 Ⓒ Accused statement

The accused was “leader and head” of the [brothel]; [his partner] “lived with him as his mistress and was a subordinate of his”; the accused “had great financial interests in the takings of the club”. [I]t can be established not only that the accused knew of [his mistress’s] attitude towards the prostitutes, but even that this attitude was the result of an order given to [her] by the accused.¹²⁵

Similar means of proof

Sexual slavery / *Mens rea 2* / Conduct, p. 52

[Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]*Evidence inferred from an utterance, a document or a deed*

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** found evidence that the accused ordered acts of a sexual nature:

Ⓐ Victim statement
 Ⓒ Accused statement

The accused was “leader and head” of the [brothel]; [his partner] “lived with him as his mistress and was a subordinate of his”; the accused “had great financial interests in the takings of the club”. [I]t can be established not only that the accused knew of [his mistress’s] attitude towards the prostitutes, but even that this attitude was the result of an order given to [her] by the accused.¹²⁶

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

Similar means of proof

Sexual slavery / *Mens rea 2* / Consequence I, p. 52

[Consequence II] The perpetrator was aware that such person or persons would engage in acts of a sexual nature in the ordinary course of events

No means of proof sourced from the dataset.

Similar means of proof

Sexual slavery / *Mens rea 2* / Consequence II, p. 52

[Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent

No means of proof sourced from the dataset.

Similar means of proof

Rape / *Mens rea 2* / Circumstance, p. 36

5.4. [Mens rea 2]

[Consequence I] The perpetrator meant to obtain or expected to obtain pecuniary or other advantage [OR]

Evidence of monetary payment or payment in goods for a person or their services

The Netherlands Temporary Court-Martial at Batavia in the **Case No. 76** established that the accused obtained monetary payment for the services of the victims:

④ Victim statement

Some girls were required to earn a minimum of 450 guilders per evening, and thus to receive at least three visitors. No girl was allowed to receive less than two visitors every night.¹²⁷

[T]he accused “drew a very good income” from the club and the girls “were forced to work very hard in order to make the takings as high as possible.”¹²⁸

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

Similar means of proof

Sexual slavery / *Actus reus* 1 / Exercise of the right of ownership / Evidence of benefit to the perpetrator, p. 44

[Consequence II] The perpetrator was aware that he/she or another person would obtain or expected to obtain pecuniary or other advantage

No means of proof sourced from the dataset.

[Circumstance] The person was aware that another person obtained or expected to obtain pecuniary or other advantage

No means of proof sourced from the dataset.

MEANS OF PROOF CHART: ENFORCED PROSTITUTION

ACTUS REUS 1

The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment of such person or persons' incapacity to give genuine consent

MENS REA 1

[Conduct] The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature

ACTUS REUS 2

The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature

MENS REA 2

[Consequence I] The perpetrator meant to obtain or expected to obtain pecuniary or other advantage [OR]

The perpetrator caused one or more persons to engage in an act of a sexual nature

[Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]

The perpetrator obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of sexual nature [OR]

[Consequence II] The perpetrator was aware that he/she or another person would obtain or expected to obtain pecuniary or other advantage

Evidence of perpetrator directly causing the person to engage in acts of a sexual nature

Evidence inferred from an utterance, a document or a deed
 (A)(C) Case No. 76, p. 125

Evidence of monetary payment for the victim's services
 (A) Case No. 76, p. 125

Evidence of monetary payment for the victim's services
 (A) Case No. 76, p. 125

Evidence of perpetrator placing victims in a situation where acts of a sexual nature would occur

Evidence of forced marriage
 (A)(B) Katanga TJ, para 1016

Evidence of monetary payment for the victim's services
 (A) Case No. 76, pp. 123, 125

[Consequence III] The perpetrator was aware that he/she or another person would obtain or expected to obtain pecuniary or other advantage

The perpetrator's or victim's acts of a sexual nature occurred through force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent

Evidence inferred from an utterance, a document or a deed
 (A)(C) Case No. 76, p. 125

Another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of sexual nature

No means of proof sourced from the dataset

Evidence of use of force

Evidence of invasion by a camp commander
 (A)(B) Mucić et al. TJ, para. 958

Evidence that another person obtained or expected to obtain pecuniary or other advantage

[Circumstance] The perpetrator was aware that another person obtained or expected to obtain pecuniary or other advantage

Evidence of absence of consent or voluntary participation

Evidence inferred from circumstances
 (A)(B)(C) Pritić et al. TJ vol III., para. 764

No means of proof sourced from the dataset

Evidence of punishment

Evidence of deportation
 (A) Case No. 76, p. 123

No means of proof sourced from the dataset

Evidence of fear of violence (or duress)

Evidence of incapacity through misrepresentation, force or coercion
 (A) Case No. 76, pp. 122, 123

No means of proof sourced from the dataset

Evidence of detention/captivity

Evidence of age-related incapacity
 (A)(B) Case No. 76, p. 123

No means of proof sourced from the dataset

TPOLOGY OF EVIDENCE

(A)	Victim statement
(B)	Witness statement
(C)	Accused statement
(D)	Expert witness statement
(E)	Documentary evidence
(F)	Medical records
(G)	Forensic evidence
(H)	Physical evidence
(I)	Phone, audio and video materials
(J)	Digital evidence
(K)	Maps, geo-location, building structure
(L)	Statistical data
(M)	Contextual data
(N)	Similar means of proof to those used in the crime(s), such as robbery, crimes/charges

6

6. Forced pregnancy 70

6.1. [Actus reus 1] The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law 72

6.2. [Mens rea 1] 76

[Conduct] The perpetrator meant to confine one or more women forcibly made pregnant

[Consequence I] The perpetrator meant to affect the ethnic composition of any population or carry out other grave violations of international law by confining one or more women forcibly made pregnant [OR]

[Consequence II] The perpetrator was aware that the confinement of one or more women forcibly made pregnant would affect the ethnic composition of any population or would enable to carry out other grave violations of international law in the ordinary course of events

[Circumstance] The perpetrator was aware that one or more confined women had forcibly been made pregnant

6. Forced pregnancy

Legal requirements and components of forced pregnancy under the ICC Statute			
<i>Actus reus</i> 1		<p>The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law</p> <p>The perpetrator confined one or more women [AND]</p> <p>One or more women had been forcibly made pregnant [AND]</p> <p>The perpetrator intended to affect the ethnic composition of any population [OR]</p> <p>The perpetrator intended to carry out grave violations of international law</p>	
	Conduct	The perpetrator meant to confine one or more women forcibly made pregnant	
	Consequence	<p><i>[Consequence I]</i> The perpetrator meant to affect the ethnic composition of any population or to carry out other grave violations of international law by confining one or more women forcibly made pregnant [OR]</p> <p><i>[Consequence II]</i> The perpetrator was aware that the confinement of one or more women forcibly made pregnant would affect the ethnic composition of any population or would enable to carry out other grave violations of international law in the ordinary course of events</p>	
	Circumstance	The perpetrator was aware that one or more confined women had forcibly been made pregnant	
Possible charges for forced pregnancy under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Forced pregnancy	-	Forced pregnancy (ICC Art. 7(1)(g))	Forced pregnancy (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm	Rape	Rape

Table 11. *Actus reus* and *mens rea* of, and possible charges for, forced pregnancy under the ICC Statute.

6.1. [Actus reus 1] The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law

The perpetrator confined one or more women [AND]

Evidence showing confinement of one or more women

The ICC Pre-Trial Chamber in *Ongwen* held that substantial grounds¹²⁹ exist to believe that the accused confined the victim under guard in an enclosed space:

④ Victim statement

[The victim] testified that she had been in captivity with the LRA for eight years from her abduction in August 1996 by [the accused] and other LRA fighters until her escape in July 2004. [...] The second and third of her pregnancies fall within the Court's temporal jurisdiction, and for the duration of both these pregnancies she remained confined to [the accused's] household without the possibility of escape.¹³⁰

From her arrival in [the accused's] household and until her escape in 2011, [the victim] was kept confined by [the accused], including during her first forced pregnancy in 2005, by being guarded by his armed security escorts and through the fear that if she escaped she would be followed, taken back and killed.¹³¹

Similar means of proof

Rape / *Actus reus 2* / Evidence of detention/captivity, p. 29

/ Evidence of absence of consent or voluntary participation, p. 32

Enforced prostitution / *Actus reus 1* / Evidence of detention/captivity, p. 62

The women had been forcibly made pregnant [AND]

Evidence of pregnancy

The ICC Pre-Trial Chamber in *Ongwen* accepted victim testimony as a proof of her pregnancy:

④ Victim statement

As a result of rapes by Dominic Ongwen, [the victim] became pregnant three times.¹³²

¹²⁹ The evidentiary standard during the confirmation of charges hearing is that of 'substantial grounds to believe'. See ICC Art. 61(5).

¹³⁰ ICC, *P. v. Dominic Ongwen*, *supra* note 95, para. 111.

¹³¹ *Ibid.*, para. 114.

¹³² *Ibid.*, para. 111.

Similar means of proof

Sexual slavery / *Actus reus 2* / Evidence of results of sexual acts, p. 51

Evidence of forcible nature of the initial act leading to pregnancy

The ICC Pre-Trial Chamber in **Ongwen** found evidence of the forcible nature of the initial rapes that led to the impregnation of the victim:

④ Victim statement

The day [the victim] was abducted, [the accused] forced her to become his so-called “wife” and continued to have sex with her by force repeatedly until her escape. She was beaten when she refused to have sex with him, and at no time was she able to escape. [...] As a result of rapes by [the accused], [the victim] became pregnant three times.¹³³

Similar means of proof

Rape / *Actus reus 2*, pp. 26-32

Enforced prostitution / *Actus reus 1* / The perpetrator’s or victim’s acts occurred through force, threat of force or coercion, pp. 61-63

Other forms of sexual violence / *Actus reus 1* / The perpetrator’s or victim’s acts occurred through force, threat of force or coercion, p. 94

Evidence of forcing a woman to remain pregnant by limiting her reproductive choices

No means of proof sourced from the dataset.

Evidence of the general use of force in ensuring that a woman remained pregnant

The ICC Pre-Trial Chamber in **Ongwen** found that the victim remained in confinement during her forced pregnancies:

④ Victim statement

The second and third of her pregnancies fall within the Court’s temporal jurisdiction, and for the duration of both these pregnancies she remained confined to [the accused’s] household without the possibility of escape.¹³⁴

Furthermore, the same Chamber found evidence of the victim’s fear of violence or duress:

④ Victim statement

From her arrival in [the accused’s] household and until her escape in 2011, [the victim] was kept confined by [the accused], including during her first forced preg-

133 *Ibid.*

134 *Ibid.*

nancy in 2005, by being guarded by his armed security escorts and through the fear that if she escaped she would be followed, taken back and killed.¹³⁵

Similar means of proof

Rape / *Actus reus 2* / By force, pp. 26-28

The perpetrator intended to affect the ethnic composition of any population [OR]

Evidence establishing the ethnic composition of a population

The ICTY Trial Chamber in **Karadžić** relied upon census data to establish ethnic composition of the relevant municipality in analysing the existence of national, ethnic, racial or religious groups:

Ⓒ Statistical data

Banja Luka is the largest municipality in BiH and is located to the east of Prijedor and Sanski Most and to the south of Bosanska Gradiška. According to the 1991 census, Banja Luka municipality had 195,139 inhabitants, of whom about 55% were Bosnian Serbs, 15% were Bosnian Muslims, and 15% were Bosnian Croats.¹³⁶

Charges of the case

Genocide [ICTY Art. 4(3)(a)]

“In relation to consequence”: Evidence that the perpetrator meant to affect the ethnic composition of a population

The ICTR Trial Chamber in **Musema** accepted the statement of the accused to establish that he intended to destroy the ethnic group in question:

Ⓐ Victim statement
Ⓑ Witness statement
Ⓒ Accused statement

[O]n the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of [one victim, the accused] declared: “The pride of the Tutsis will end today”. In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such.¹³⁷

¹³⁵ *Ibid.*, para. 114.

¹³⁶ ICTY, *The Prosecutor v. Radovan Karadzic*, TC. Public Redacted Version of Judgement Issued on 24 March 2016 (Volume 1), Case No. IT-95-5/18-T, 24 March 2016, para. 1369 (citations omitted).

¹³⁷ ICTR, *P. v. Alfred Musema*, *supra* note 37, para. 933.

Charges of the case

Genocide [ICTR Art. 2(3)(a)]

The perpetrator intended to carry out other grave violations of international law

Evidence of confinement for the purpose of committing grave violations of international law

The ICC Pre-Trial Chamber in **Ongwen** considered that the perpetrator fulfilled the specific intent requirement by confining the victim for the purpose of committing grave violations of international law:

④ Victim statement

As a result of rape by [the accused], [the victim] became pregnant four times while in LRA. [The accused] confined the pregnant [victim] during these pregnancies, including one pregnancy in 2005 in northern Uganda with the intent to carry out grave violations of international law including to use her as one of his exclusive conjugal partners, rape, sexually enslave, enslave and torture her.¹³⁸

Other related crimes referred to by the Chamber

Crimes against humanity / Other inhumane acts (in the form of forced marriage) [ICC Art. 7(1)(k)]

Crimes against humanity and war crimes / Torture [ICC Art. 7(1)(f) and Art. 8(2)(c)(i)]

Crimes against humanity and war crimes / Rape [ICC Art. 7(1)(g) and Art. 8(2)(e)(iv)]

Crimes against humanity and war crimes / Sexual slavery [ICC Art. 7(1)(g) and Art. 8(2)(e)(vi)]

Crimes against humanity / Enslavement [ICC Art. 7(1)(c)]

Evidence that the perpetrator intended to permanently stigmatise a victim

No means of proof sourced from the dataset.

¹³⁸ ICC, *P. v. Dominic Ongwen DCC*, *supra* note 97, para. 88.

6.2. [Mens rea 1]¹³⁹

[Conduct] The perpetrator meant to confine one or more women forcibly made pregnant

Evidence inferred from an utterance, a document or a deed

The ICTY Appeal Chamber in *Krnjelac* accepted evidence that the perpetrator performed duties making him a part of a system engaged in imprisonment:

- Ⓐ Victim statement
- Ⓑ Witness statement
- Ⓒ Accused statement

The Appeals Chamber holds that, with regard to [the accused's] duties, the time over which he exercised those duties, his knowledge of the system in place, the crimes committed as part of that system and their discriminatory nature, a trier of fact should reasonably have inferred from the above findings that he was part of the system and thereby intended to further it.¹⁴⁰

Charges of the case

Grave breaches of the Geneva Conventions of 1949 / Unlawful confinement [ICTY Art. 2(g)]

[Consequence I] The perpetrator meant to affect the ethnic composition of any population or to carry out other grave violations of international law by confining one or more women forcibly made pregnant [OR]

No means of proof sourced from the dataset.

[Consequence II] The perpetrator was aware that the confinement of one or more women forcibly made pregnant would affect the ethnic composition of any population or would enable to carry out other grave violations of international law in the ordinary course of events

No means of proof sourced from the dataset.

[Circumstance] The perpetrator was aware that one or more confined women had forcibly been made pregnant

No means of proof sourced from the dataset.

¹³⁹ ICC Case Matrix: “Despite the specific intent elements required under *actus reus* 1, the general mental element requirement of Article 30 of the ICC Statute will still govern other knowledge and intent required of the perpetrator regarding the confinement of the women forcibly made pregnant”.

¹⁴⁰ ICTY, *The Prosecutor v. Milorad Krnjelac, AC*, Judgement, Case No. IT-97-25-A, 17 September 2003, para. 111.

MEANS OF PROOF CHART: FORCED PREGNANCY

ACTUS REUS 1

The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law

MENS REA 1

The perpetrator confined one or more women [AND]

Evidence showing confinement of one or more women

Evidence of confinement under guard in an enclosed space
 (A) *Ongwen* DCC, paras. 111, 114

The women had been forcibly made pregnant [AND]

Evidence of pregnancy

Evidence of pregnancy
 (A) *Ongwen* DCC, para. 111

Evidence of forcible nature of the initial act leading to pregnancy

Evidence of the forcible nature of rapes leading to impregnation
 (A) *Ongwen* DCC, para. 111

Evidence of forcing a woman to remain pregnant by limiting her reproductive choices

No means of proof sourced from the dataset

Evidence of general use of force in ensuring that a woman remained pregnant

Evidence of confinement during the forced pregnancy
 (A) *Ongwen* DCC, para. 111

Evidence of fear of violence or duress
 (A) *Ongwen* DCC, para. 114

The perpetrator intended to affect the ethnic composition of any population [OR]

Evidence establishing the ethnic composition of a population

Evidence of census data
 (L) *Karadzic* TJ, para. 1369

"In relation to consequence": Evidence that the perpetrator meant to affect the ethnic composition of a population

Evidence of accused's statements
 (A)(B)(C) *Musema* TJ, para. 933

The perpetrator intended to carry out grave violations of international law

Evidence of confinement for the purpose of committing grave violations of international law
 (A) *Ongwen* DCC, p 93, para 88

Evidence that the perpetrator intended to permanently stigmatise a victim

No means of proof sourced from the dataset

[Conduct] The perpetrator meant to confine one or more women forcibly made pregnant

Evidence inferred from an utterance, a document or a deed
 (A)(B)(C) *Krnjic* JA, para. 111

[Consequence I] The perpetrator meant to affect the ethnic composition of any population or to carry out other grave violations of international law by confining one or more women forcibly made pregnant [OR]

No means of proof sourced from the dataset

[Consequence II] The perpetrator was aware that the confinement of one or more women forcibly made pregnant would affect the ethnic composition of any population or would enable to carry out other grave violations of international law in the ordinary course of events

No means of proof sourced from the dataset

[Circumstance]: The perpetrator was aware that one or more confined women had forcibly been made pregnant

No means of proof sourced from the dataset

TYPLOGY OF EVIDENCE

- | | | | |
|------------------------------|--------------------------------------|--|--|
| (A) Victim statement | (F) Medical records | (J) Digital evidence | (K) Similar means of proof under different SGBV crimes/charges |
| (B) Witness statement | (G) Forensic evidence | (L) Maps, geo-location, building structure | |
| (C) Accused statement | (H) Physical evidence | (M) Statistical data | |
| (D) Expert witness statement | (I) Phone, audio and video materials | (N) Contextual data | |
| (E) Documentary evidence | | | |

7

7. Enforced sterilisation 80

7.1. [Actus reus 1] The perpetrator deprived one or more persons of biological reproductive capacity 82

7.2. [Actus reus 2] The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent 82

7.3. [Mens rea 1] 84

[Conduct] The perpetrator meant to engage in conduct which deprived one or more persons of biological reproductive capacity

[Consequence 1] The perpetrator meant to cause the deprivation of one or more persons of biological reproductive capacity [OR]

[Consequence 2] The perpetrator was aware that one or more persons would be deprived of biological reproductive capacity in the ordinary course of events

7.4. [Mens rea 2] 85

[Circumstance 1] The perpetrator aware that the conduct was not justified by the medical or hospital treatment [AND]

[Circumstance 2] The perpetrator was aware of absence of genuine consent

7. Enforced sterilisation

Legal requirements and components of enforced sterilisation under the ICC Statute			
Actus reus 1	The perpetrator deprived one or more persons of biological reproductive capacity	<i>[The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice, Elements of Crimes: Art. 7(1)(g)-5, footnote 19 and 8(2)(b)(xxii)-5, footnote 54]</i>	
Actus reus 2	The conduct was:	Not justified by the medical or hospital treatment of the person or persons concerned [AND] Not carried out with their genuine consent <i>[It is understood that genuine consent does not include consent obtained through deception (EoC Art. 7(1)(g)-5, footnote 20)]</i>	
Mens rea 1	Conduct	The perpetrator meant to engage in conduct which deprived one or more persons of biological reproductive capacity	
	Consequence	<i>[Consequence I]</i> The perpetrator meant to cause the deprivation of one or more persons of biological reproductive capacity [OR] <i>[Consequence II]</i> The perpetrator was aware that one or more persons would be deprived of biological reproductive capacity in the ordinary course of events	
Mens rea 2	Circumstance	<i>[Circumstance I]</i> The perpetrator was aware that the conduct was not justified by the medical or hospital treatment [AND] <i>[Circumstance II]</i> The perpetrator was aware of absence of genuine consent	
Possible charges for enforced sterilisation under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Enforced sterilisation	-	Enforced sterilisation (ICC Art. 7(1)(g))	Enforced sterilisation (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Measures to prevent births	-	-

Table 12. *Actus reus* and *mens rea* of, and possible charges for, enforced sterilisation under the ICC Statute.

7.1. [Actus reus 1] The perpetrator deprived one or more persons of biological reproductive capacity

Evidence of methods employed to deprive victims of their biological reproductive capacity

The IMT Trial Chamber in the *USA v. Karl Brandt et al. ('Medical Case')* assessed the selection process for involuntary medical experiments:

- Ⓐ Victim statement
 Ⓒ Accused statement
 Ⓔ Documentary evidence
- At least 100 involuntary experimental subjects-Poles, Russians, French, and prisoners of war-were used for these experiments. Only young, well-built inmates, in the best of health, were selected for them.¹⁴¹

The same Chamber accepted evidence of sterilisation and castration:

- Ⓐ Victim statement
- A French physician of Jewish descent who was confined at Auschwitz from September 1943 to January 1945, testified that near Auschwitz was Birkenau camp where people were sterilized by SS doctors. About 100 male Poles who had been sterilized at Birkenau were attended by the witness after the operation. Later this group was castrated by the camp physicians.¹⁴²

As well as the deprivation of reproductive capacity through repeated X-ray exposure:

- Ⓐ Victim statement
- A Polish Jew testified before the Tribunal that while confined in Auschwitz [he was] forcibly subjected to severe X-ray exposure and was castrated later in order that the effects of the X-ray could be studied.¹⁴³

It also accepted that the sterilisation of women took place through injections of irritants into the uterus:

- Ⓔ Documentary evidence
- [Dr. Clauberg's method for the sterilization of women] was based upon the injection of an irritating solution into the uterus. Clauberg conducted widespread experiments on Jewish women and gypsies in the Auschwitz concentration camp. Several thousand women were sterilized by Clauberg in Auschwitz.¹⁴⁴

7.2. [Actus reus 2] The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent

The conduct was not justified by the medical or hospital treatment of the person or persons concerned [AND]

Evidence that the conduct of sterilisation was aimed at lowering the reproductive power, not at the medical treatment of a person

141 IMT, *The USA vs. Karl Brandt et al.*, published in *Trials of war criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (Volume I)*, p. 702 (*The USA vs. Karl Brandt et al. vol. I*); MT, *The USA v. Karl Brandt et al.*, published in *Trials of war criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (Volume II)*, p. 239 (*The USA vs. Karl Brandt et al. vol. II*).

142 *Ibid.*, vol. II, p. 279.

143 *Ibid.*

144 *Ibid.*, vol. I, p. 700-701; *ibid.*, vol. II, p. 251.

The IMT Trial Chamber in the *Medical Case* accepted documentary evidence proving that medical treatment was not the purpose of sterilisation experiments:

[B]ecause of the urgent need for laborers in Germany, it was decided not to kill Jews who were able to work, but as an alternative, to sterilize them.

[...]

On 23 June 1942 Brack wrote the following letter to Himmler:

Dear Reichsfuehrer:

* * * Among 10 millions of Jews in Europe, there are, I figure, at least 2-3 millions of men and women who are fit enough to work. Considering the extraordinary difficulties the labour problem presents us with I hold the view that those 2-3 millions should be specially selected and preserved. This can however only be done if at the same time they are rendered incapable to propagate. About a year ago I reported to you that agents of mine have completed the experiments necessary for this purpose. I would like to recall these facts once more. Sterilization, as normally performed on persons with hereditary diseases is here out of the question because it takes too long and is too expensive. Castration by X-ray is however not only relatively cheap, but can also be performed in many thousands on the shortest time. I think at this time that it is already irrelevant whether the people in question become aware of having been castrated after some weeks or months, once they feel the effects.¹⁴⁵

© Documentary evidence

The conduct was not carried out with the genuine consent of the person or persons concerned

Evidence of sterilisation against the will of person or persons concerned

The IMT Trial Chamber in the *Medical Case* established that the conduct was carried out against the will of the subjects:

In every single instance appearing in the record, subjects were used who did not consent to the experiments; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers. In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment. In many cases experiments were performed by unqualified persons; were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death.¹⁴⁶

Ⓐ Victim statement
 © Accused statement
 © Documentary evidence

¹⁴⁵ *Ibid.*, vol. II, pp. 278-279.

¹⁴⁶ *Ibid.*, p. 183.

Evidence of enforced sterilisation programs as part of a larger plan

The IMT Trial Chamber in the *Medical Case* found that the sterilisation program was part of the Nazi policy:

Ⓔ Documentary evidence

The persecution of Jews had become a fixed Nazi policy very soon after the outbreak of World War II. By 1941 that persecution had reached the stage of the extermination of Jews, both in Germany and in the occupied territories. This fact is confirmed by Brack himself, who testified that he had been told by Himmler that he, Himmler, had received a personal order to that effect from Hitler. The record shows that the agencies organised for the so-called euthanasia of incurables were used for this bloody pogrom. Later, because of the urgent need for laborers in Germany, it was decided not to kill Jews who were able to work, but as an alternative, to sterilize them.¹⁴⁷

7.3. [Mens rea 1]

[Conduct] The perpetrator meant to engage in conduct which deprived one or more persons of biological reproductive capacity

No means of proof sourced from the dataset.

[Consequence I] The perpetrator meant to cause the deprivation of one or more persons of biological reproductive capacity [OR]

Evidence inferred from an utterance, a document or a deed

The IMT Trial Chamber in the *Medical Case* accepted the participation of an accused (Gebhardt) in meetings where the planning or preparation of medical experiments took place as evidence:

Ⓔ Documentary evidence

[A] conference took place between Himmler, Gebhardt, [...] Gluecks and [...] Clauberg, to discuss the sterilization of Jewesses. Dr. Clauberg was promised that the Auschwitz concentration camp would be placed at his disposal for experiments on human beings and animals, and he was requested to discover by means of fundamental experiments a method of sterilizing persons without their knowledge. [...] From this evidence it is apparent that Gebhardt was present at the initial meeting which launched at least one phase of the sterilization program in the concentration camps, and thus had knowledge.¹⁴⁸

¹⁴⁷ *Ibid.*, p. 278.

¹⁴⁸ *Ibid.*, vol. I, p. 728; *ibid.*, p. 226.

[Consequence II] The perpetrator was aware that one or more persons would be deprived of biological reproductive capacity in the ordinary course of events

Evidence inferred from an utterance, a document or a deed

The IMT Trial Chamber in the **Medical Case** held that it is insufficient to assume that the accused person had knowledge of the acts due to the role of the specific accused person within the organisational structure under examination:

© Judges deliberations

Knowledge of sterilization experiments is imputed to the defendant [...] by means of a simple assumption, although the Tribunal pointed out in several passages of the judgment that a mere assumption of guilt, in our case of knowledge, is insufficient. [The defendant] only worked in the Race and Settlement Office as a doctor dealing with hereditary questions for members of the SS and their families; as medical superintendent he had to supervise this activity and the social welfare doctors. [...] If the Race and Settlement Office occasionally dealt, amongst other measures, with one of racial policy through its field offices, the doctors were not involved in any case, and there is not the least indication that [the defendant] knew or ought to have known about such measures. Even the judgment itself reveals to what extent the sterilization experiments were kept secret.¹⁴⁹

7.4. [Mens rea 2]

[Circumstance I] The perpetrator was aware that the conduct was not justified by the medical or hospital treatment [AND]

| No means of proof sourced from the dataset.

[Circumstance II] The perpetrator was aware of absence of genuine consent

Evidence inferred from an utterance, a document or a deed

The IMT Trial Chamber in the **Medical Case** accepted documentary evidence establishing that the accused was aware that the conduct – use of X-rays – was not justified and that the victims had not provided genuine consent:

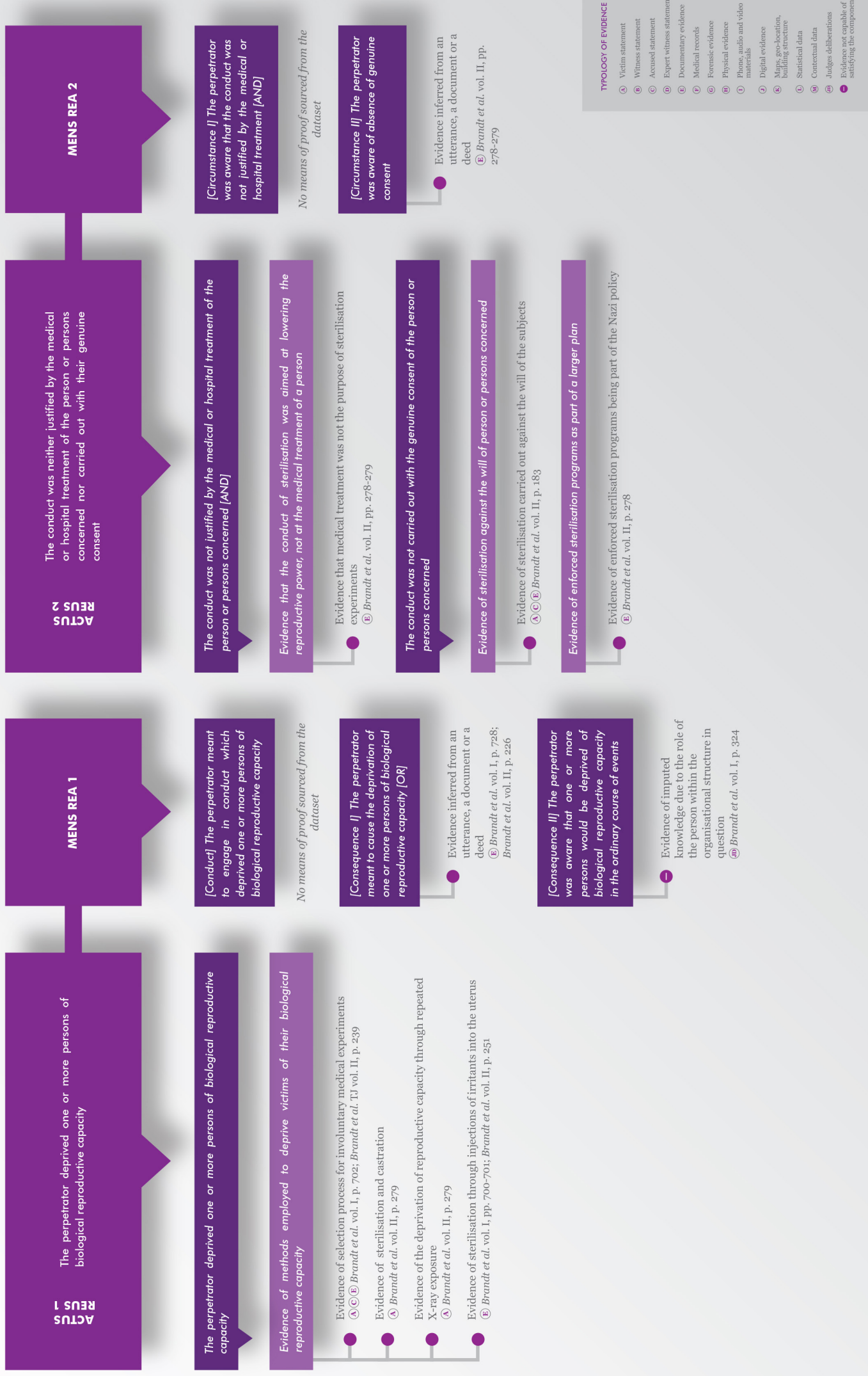
© Documentary evidence

Himmler instructed Brack to inquire of physicians who were engaged in the Euthanasia Program about the possibility of a method of sterilizing persons without the victim's knowledge. Brack worked on the assignment, with the result that in March 1941, he forwarded to Himmler his signed report on the results of experiments concerning the sterilization of human beings by means of X-rays. In the report a method was suggested by which sterilization with X-ray could be effected on groups of persons without their being aware of the operation.¹⁵⁰

¹⁴⁹ *Ibid.*, vol. I, p. 324.

¹⁵⁰ *Ibid.*, vol. II, pp. 278-279.

MEANS OF PROOF CHART: ENFORCED STERILISATION



8

8. Other forms of sexual violence of comparable gravity 88

- 8.1. [Actus reus 1] The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent 90
- 8.2. [Actus reus 2] Such conduct was of a gravity comparable to: 94
- [CAH, ICC Art. 7] the other offences in article 7, paragraph 1 (g) of the Statute [OR];
 [WC, ICC Art. 8(2)(b)(xxii)-6] that of a grave breach of the Geneva Conventions [OR];
 [WC, ICC Art. 8(2)(e)(vi)-6] that of a serious violation of Article 3 common to the four Geneva Conventions
- 8.3. [Mens rea 1] 94
- [Conduct] The perpetrator meant to engage in committing an act of a sexual nature or causing a person or persons to engage in an act of a sexual nature
 [Consequence I] The perpetrator meant to commit an act of a sexual nature or to cause a person or persons to engage in an act of a sexual nature [OR]
 [Consequence II] The perpetrator was aware he or she would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature in the ordinary course of events
 [Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent
- 8.4. [Mens rea 2] 95
- [Circumstance] The perpetrator was aware of the factual circumstances that established the gravity of the conduct

8. Other forms of sexual violence of comparable gravity

Legal requirements and components of other forms of sexual violence of comparable gravity under the ICC Statute	
<i>Actus reus 1</i>	<p>The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent</p> <p>Committed an act of a sexual nature against one or more person; [OR]</p> <p>Caused such person or persons to engage in an act of a sexual nature [OR]</p> <p>The perpetrator's or victim's acts of a sexual nature occurred through force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent</p>
<i>Actus reus 2</i>	<p>Such conduct was of a gravity comparable to:</p> <p><i>[CAH, ICC Art. 7]</i> the other offences in article 7, paragraph 1 (g) of the Statute [OR]</p> <p><i>[WC, ICC Art. 8(2)(b)(xxii)-6]</i> that of a grave breach of the Geneva Conventions [OR]</p> <p><i>[WC, ICC Art. 8(2)(e)(vi)-6]</i> that of a serious violation of Article 3 common to the four Geneva Conventions</p>
<i>Mens rea 1</i>	<p>Conduct</p> <p>The perpetrator meant to engage in committing an act of a sexual nature or causing a person or persons to engage in an act of a sexual nature</p> <hr/> <p>Consequence</p> <p><i>[Consequence I]</i> The perpetrator meant to commit an act of a sexual nature or to cause a person or persons to engage in an act of a sexual nature [OR]</p> <p><i>[Consequence II]</i> The perpetrator was aware he or she would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature in the ordinary course of events</p> <hr/> <p>Circumstance</p> <p>The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent</p>
<i>Mens rea 2</i>	<p>Circumstance</p> <p>The perpetrator was aware of the factual circumstances that established the gravity of the conduct</p>

Possible charges for other forms of sexual violence of comparable gravity under the ICC Statute

	Genocide	Crimes against humanity	War crimes
Sexual violence	-	Sexual violence (ICC Art. 7(1)(g))	Sexual violence (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily and mental harm <i>Footnote 3 of the elements of crimes for ICC Art.6(b) lists sexual violence as a potential conduct of serious bodily or mental harm</i>	Torture Persecution	Torture

Table 12. *Actus reus* and *mens rea* of, and possible charges for, sexual violence under the ICC Statute.

8.1. [Actus reus 1] The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent

The perpetrator committed an act of a sexual nature against one or more persons [OR]

Evidence that the perpetrator sexually molested one or more persons

The ICTY Trial Chamber in *Milutinović et al.* accepted evidence of forced nudity and touching persons' breasts and vagina:

- (A) Victim statement
- (B) Witness statement

The first woman to come back told Rrahmani that she was forced to take her clothes off [...]. The soldier searching her touched her breasts and taunted her with sexual comments. [The victim] also stated that a tall man with blonde hair took the women out of the room and searched them one by one, forcing them to take their clothes off. Eventually, over a period of two hours, he took out five young girls a number of times [...]. They went out one by one and came back with their clothes in disorder, terrified and not willing to speak about what had happened. One said that they were stripped naked. At one point [the victim] was also taken outside, where she saw the other two men with tiger badges. The blonde man ordered her to take her clothes off and dropped his trousers to his knees. He started touching her breasts and vagina, at which point she fainted. When she regained consciousness she realised that she had not been raped.¹⁵¹

¹⁵¹ ICTY, *The Prosecutor v. Milutinović et al.*, TC, Case No. IT-05-87-T, Judgement (Volume II), 26 February 2009, para. 631.

Alternative charges

Crimes against humanity / Persecution on political, racial and religious grounds [ICTY Art. 5(h)]

The ICTY Trial Chamber in *Furundžija* relied on evidence of running a knife along inner thighs of the victims:

Ⓐ Victim statement

During the questioning by the accused, one of the soldiers forced [the victim] to undress and then rubbed his knife along her inner thigh and lower stomach and threatened to put his knife inside her vagina should she not tell the truth. The accused continued to interrogate [the victim] throughout this threatening conduct.¹⁵²

Alternative charges

Crimes against humanity / Persecution on political, racial and religious grounds [ICTY Art. 5(h)]

Evidence that the perpetrator mutilated a person or person's sexual characteristics

The ICC Pre-trial Chamber in *Kenyatta et al.* determined that the acts of forcible circumcision and penile amputation did not possess the requisite sexual nature:

Ⓐ Witness statement

Ⓑ Documentary evidence

Ⓒ Medical records

The Chamber finds that the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other. Therefore, the Chamber concludes that the acts under consideration do not qualify as other forms of sexual violence within the meaning of article 7(1)(g) of the Statute. However, as explained in the following section, the Chamber considers them as part of the Prosecutor's allegation of acts causing severe physical injuries and will address them accordingly.¹⁵³

Other related crimes referred to by the Chamber

Crime against humanity / Other inhumane acts [ICC Art. 7(1)(k)]

¹⁵² ICTY, *P. v. Ante Furundžija*, *supra* note 29, para. 40. See also para. 82.

¹⁵³ ICC, *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, ICC-01/09-02/11-382-Red. 23 January 2012, (*P. v. Uhuru Muigai Kenyatta et al. DCC*), para. 266 (citations omitted).

Powderly and Hayes have vigourously criticized the Pre-Trial Chamber’s reasoning in the decision, arguing that they: focused on the severity of the injury inflicted rather than the deliberate targeting of a sexual organ:

Publicists’
commentary

[The Pre-Trial Chamber] pursued an incomprehensibly restrictive interpretation of this element in its decision on the confirmation of charges in the Kenyatta case, using its discretion to recharacterise a charge of other forms of sexual violence (relating to the amateur forcible circumcision of men of Luo ethnicity).

The Chamber came to the remarkable conclusion that “the evidence [...] does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men” and therefore held that the facts should more properly be characterised as the crime against humanity of other inhumane acts on the basis of the severity of the injury inflicted.

Based on the logic of Pre-Trial Chamber II in this case (which has not been followed in the jurisprudence of any other Pre-Trial or Trial Chamber to date), female genital mutilation would not necessarily constitute an act of sexual violence if the severity of the injury inflicted was deemed to be a more relevant legal element than the deliberate targeting of a sexual organ.¹⁵⁴

Other related crimes referred to by the Chamber

Crime against humanity / Other inhumane acts [ICC Art. 7(1)(k)]

Evidence that the victim was subjected to sexual verbal abuse

No means of proof sourced from the dataset.

Similar means of proof

Rape / *Actus reus 2* / Evidence of fear of violence (or duress), p. 28

/ Evidence of psychological oppression, p. 30

The perpetrator caused such person or persons to engage in one or more acts of a sexual nature

Evidence that the perpetrator subjected one or more persons to forced nudity

The Trial Chamber in **Akayesu** established that an incident of forced nudity constituted sexual violence:

¹⁵⁴ Joseph Powderly and Niamh Hayes, “Article 7”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed.), C.H. Beck/Hart/Nomos, 2016, p. 217.

Ⓢ Witness statement

Witness KK testified regarding an incident in which the Accused told the Interahamwe to undress a young girl named Chantal, whom he knew to be a gymnast, so that she could do gymnastics naked.¹⁵⁵

The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence.¹⁵⁶

Evidence of perpetrator directly causing the person to engage in acts of a sexual nature

No means of proof sourced from the dataset.

Similar means of proof

Sexual slavery / *Actus reus 2* / Causation, p. 48

Evidence of perpetrator placing victims in a situation where acts of a sexual nature would occur

No means of proof sourced from the dataset.

Similar means of proof

Sexual slavery / *Actus reus 2* / Causation, p. 48

The perpetrator's or victim's acts of a sexual nature occurred through force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent

Similar means of proof

Rape / *Actus reus 2*, pp. 26-32

Enforced prostitution / *Actus reus 1*, pp. 61-63

¹⁵⁵ ICTR, *P. v. Jean-Paul Akayesu* T1, *supra* note 35, para. 429.

¹⁵⁶ *Ibid.*, para. 688.

- 8.2. [Actus reus 2] Such conduct was of a gravity comparable to:**
[CAH, ICC Art. 7] the other offences in article 7, paragraph 1 (g) of the Statute [OR];
[WC, ICC Art. 8(2)(b)(xxii)-6] that of a grave breach of the Geneva Conventions [OR];
[WC, ICC Art. 8(2)(e)(vi)-6] that of a serious violation of article 3 common to the four Geneva Conventions

Evidence of acts of comparable gravity

The ICTY Trial Chamber in *Brđanin* found that various incidents of sexual assault met the evidentiary standard of gravity of the offence:

ⓑ Witness statement

The Trial Chamber finds that many incidents of sexual assault occurred, including the case of a Bosnian Croat woman who was forced to undress herself in front of cheering Bosnian Serb policemen and soldiers. In another incident, a knife was run along the breast of a Bosnian Muslim woman. Frequently, it was demanded that detainees perform sex with each other. [...] The Trial Chamber is satisfied that, evaluated in their context, these acts are serious enough to rise to the level of crimes against humanity.¹⁵⁷

Alternative charge

Crimes against humanity / Persecution on political, racial and religious grounds [ICTY Art. 5(h)]

8.3. [Mens rea 1]

[Conduct] The perpetrator meant to engage in committing an act of a sexual nature or causing a person or persons to engage in an act of a sexual nature

Similar means of proof

Sexual slavery / *Mens rea 2* / Conduct, p. 52

Enforced prostitution / *Mens rea 1* / Conduct, p. 64

¹⁵⁷ ICTY, *The Prosecutor v. Radoslav Brđanin*, TC II, Judgement, Case No. IT-99-36-T, 1 September 2004, para. 1013 (citations omitted).

[Consequence I] The perpetrator meant to commit an act of a sexual nature or to cause a person or persons to engage in an act of a sexual nature [OR]

No means of proof sourced from the dataset.

Similar means of proof

Sexual slavery / *Mens rea 2* / Consequence I, p. 52

Enforced prostitution / *Mens rea 1* / Consequence I, p. 64

[Consequence II] The perpetrator was aware that he or she would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature in the ordinary course of events

No means of proof sourced from the dataset.

Similar means of proof

Sexual slavery / *Mens rea 2* / Consequence II, p. 52

Enforced prostitution / *Mens rea 1* / Consequence II, p. 64

[Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent

No means of proof sourced from the dataset.

Similar means of proof

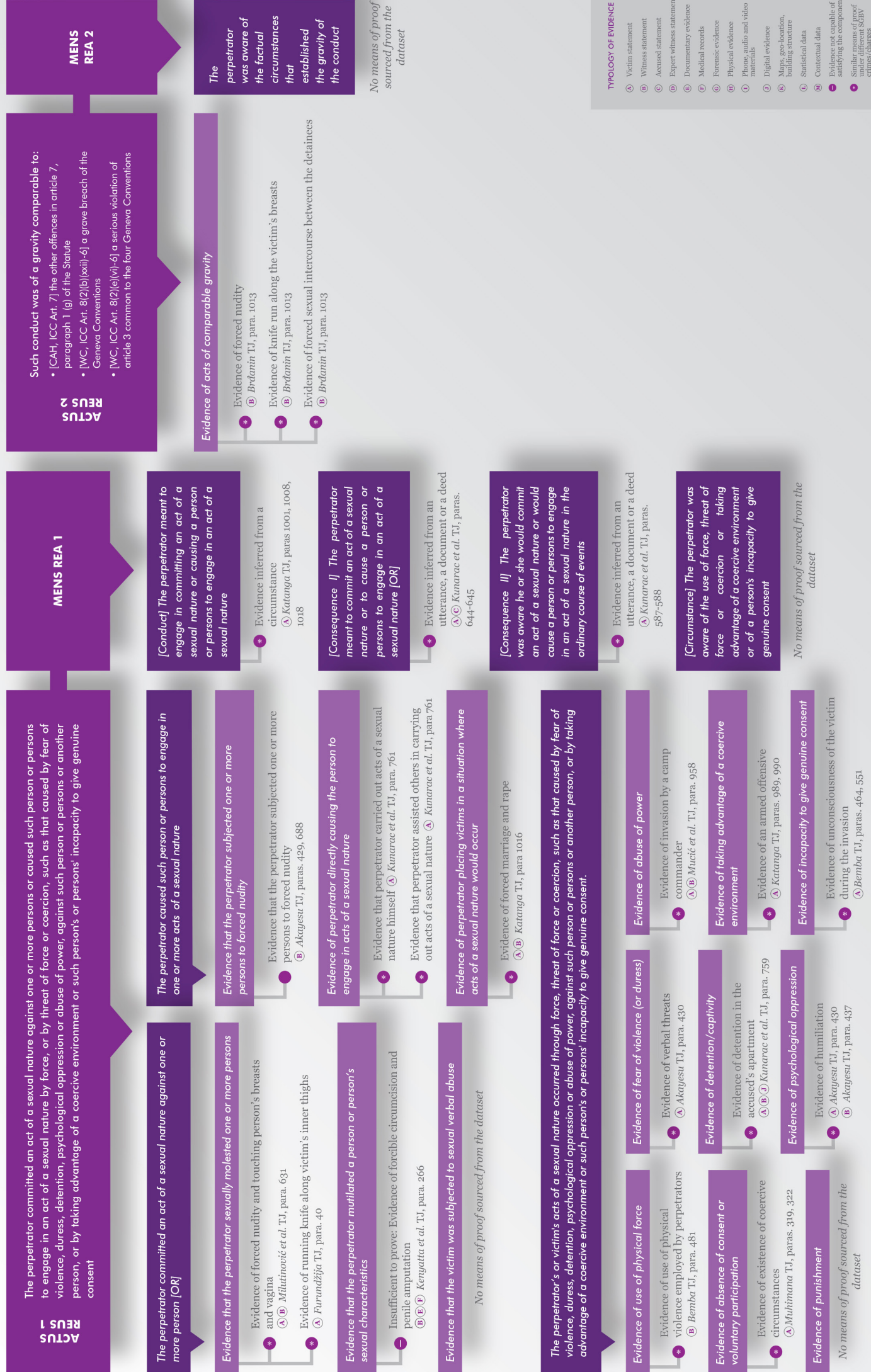
Rape / *Mens rea 2*, p. 36

8.4. [Mens rea 2]

[Circumstance] The perpetrator was aware of the factual circumstances that established the gravity of the conduct

No means of proof sourced from the dataset.

MEANS OF PROOF CHART: OTHER FORMS OF SEXUAL VIOLENCE OF COMPARABLE GRAVITY



9

9. Genocide by imposing measures intended to prevent births within a group 98

- 9.1. [*Actus reus* 1] The perpetrator imposed certain measures upon one or more persons 100
- 9.2. [*Actus reus* 2] The measures imposed were intended to prevent births within that group 100
- 9.3. [*Mens rea* 1] 102
- [Conduct] The perpetrator meant to engage in conduct of imposing certain measures upon one or more persons
- 9.4. [*Mens rea* 2] 102
- [Consequence 1] The perpetrator meant to prevent births within that group [OR]
- [Consequence 2] The perpetrator was aware that the measures imposed would prevent births within that group in the ordinary course of events

9. Genocide by imposing measures intended to prevent births

Legal requirements and components of genocide by imposing measures intended to prevent births under the ICC Statute

<i>Actus reus 1</i>	The perpetrator imposed certain measures upon one or more persons	
<i>Actus reus 2</i>	The measures imposed were intended to prevent births within that group	The measures were imposed The measures were intended to prevent births Within the group
<i>Mens rea 1</i>	Conduct	The perpetrator meant to engage in conduct of imposing certain measures upon one or more persons
<i>Mens rea 2</i>	Consequence	<i>[Consequence I]</i> The perpetrator meant to prevent births within that group [OR] <i>[Consequence II]</i> The perpetrator was aware that the measures imposed would prevent births within that group in the ordinary course of events

Possible charges for genocide by imposing measures intended to prevent births under the ICC Statute

	Genocide	Crimes against humanity	War crimes
Genocide	Measures to prevent births [ICC Art. 6(2)(d)]	-	-
Alternative charges	-	-	-

Table 13. *Actus reus* and *mens rea* of, and possible charges for, genocide by imposing measures intended to prevent births under the ICC Statute.

9.1. [Actus reus 1] The perpetrator imposed certain measures upon one or more persons

Evidence of the imposition of measures to prevent reproduction

The Supreme National Tribunal of Poland in **Poland v. Hoess** accepted witness testimony of five practices intended to prevent births:

- ⓑ Witness statement
- ⓓ Expert witness statement
- ⓔ Documentary evidence

The evidence submitted by Professor Kowalski and other witnesses showed that numerous medical experiments were performed on men and women of non-German origin, mostly Jews, at the Auschwitz concentration camp. They were carried out on orders from the supreme German authorities. The experiments fall into the following groups:

- (a) castration experiments;
- (b) experiments intended to produce sterilization;
- (c) experiments causing premature termination of pregnancy and carried out on pregnant and child-bearing women;
- (d) experiments of artificial insemination [sic];
- (e) experiments aimed at cancer research.¹⁵⁸

The same Tribunal accepted evidence of medical methods to determine the effect of x-ray experimentation on the fertility of its victims:

- ⓑ Witness statement
- ⓔ Documentary evidence

X-ray treatment was applied to male and female genital organs and in particular to ovaries and testes. Before or after the X-ray application both or only one of the ovaries and testes were removed. Different dosages, usually very large, of X-rays were applied. The results were checked by the histopathological method. This aimed at establishing the fertility or sterility of the persons subjected to the experiments. Also experiments in which small or minimal doses of X-rays were applied took place. These experiments brought about a temporary loss of fertility.¹⁵⁹

9.2. [Actus reus 2] The measures imposed were intended to prevent births within a group

The measures were imposed

Evidence that the perpetrator issued orders imposing measures intended to prevent births

The District Court of Jerusalem in **The Attorney General v. Adolf Eichmann** admitted into evidence statements on the ban of births and artificial termination of pregnancies:

- ⓓ Expert witness statement

We know of the prevention of births from the Kovno Ghetto and from Terezin. Dr. Peretz [...] testified about Kovno. There the Germans published an order in July

¹⁵⁸ The Supreme National Tribunal of Poland in *Case No. 38 Poland v. Hoess, 29 March 1947* in UN War Crimes Commission, *Law Reports on Trials of War Criminals, Volume VII, 1948*, p.14.

¹⁵⁹ *Ibid.*

1942 for the termination of all pregnancies except those in the eighth or ninth months. A woman whose pregnancy was not terminated in spite of the order was liable to the death penalty.

With regard to Terezin, we shall quote a statement [...] sent by [...] director of the health services in the ghetto, to the chief medical officer and all the gynaecologists there [...]:

© Documentary evidence

“[...] report, first of all, all pregnancies known to you which have not yet been reported, since otherwise the examining gynaecologist becomes an accessory, and therefore guilty. The information to be given to the pregnant women must be in unequivocal language, saying that the abortions have to be made on official instructions”. (T/863)

On this subject, [a camp commander] stated at his trial (T/864):

© Accused statement

“Until about March 1944, I knew nothing about the prohibition according to which women in the ghetto were forbidden to bear children [...]. Then Eppstein [head of the Jewish Council] told me that he thought that - in accordance with what had been agreed between himself and Eichmann - the general prohibition in force in Germany concerning artificial abortions did not apply to Jews, and that this agreement was exploited by Eichmann, in order to force Jewish women in the ghetto to have abortions...and when Guenther came to visit me, I asked him about it, and he confirmed to me that I did not have to see to it personally, but it was already a matter for the Jews themselves, and that the Elder of the Jews had received notification about it from Eichmann directly”.¹⁶⁰

The measures were intended to prevent births

Evidence of the nature of imposed measures

No means of proof sourced from the dataset.

Similar means of proof

Genocide / *Actus reus* 1 / Evidence of the imposition of measures to prevent reproduction, p. 102

¹⁶⁰ The District Court of Jerusalem, *The Attorney General v. Adolf Eichmann*, Judgment, 11 December 1961, para. 159

Within the group

Evidence of classification of a group

The ICTY Trial Chamber in **Krstić** accepted evidence that political and military authorities classified a group:

The evidence tendered at trial also shows very clearly that the highest Bosnian Serb political authorities and the Bosnian Serb forces operating in Srebrenica in July 1995 viewed the Bosnian Muslims as a specific national group.¹⁶¹

The same Chamber referred to the Constitution in assessing the status of a group:

Originally viewed as a religious group, the Bosnian Muslims were recognised as a “nation” by the Yugoslav Constitution of 1963.¹⁶²

Alternative charge

Genocide / Killing members of the group; Causing serious bodily or mental harm to members of the group
[ICTY Art. 4(2)(a); ICTY Art. 4(2)(b)]

9.3. [Mens rea 1]

[Conduct] The perpetrator meant to engage in conduct of imposing certain measures upon one or more persons

Evidence that the perpetrator issued orders imposing measures intended to prevent births

Similar means of proof

Genocide / *Actus reus* 1 / Evidence of the imposition of measures to prevent reproduction, p. 102

9.4. [Mens rea 2]

**[Consequence I] The perpetrator meant to prevent births within that group
[OR]**

No means of proof sourced from the dataset.

¹⁶¹ ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement (TC), 2 August 2001, para. 559.

¹⁶² *Ibid.*

[Consequence II] The perpetrator was aware that the measures imposed would prevent births within that group in the ordinary course of events

No means of proof sourced from the dataset.

GENOCIDE: IMPOSING MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP

ACTUS 1

The perpetrator imposed certain measures upon one or more persons

MENS REA 1

ACTUS 2

The measures imposed were intended to prevent births within that group

MENS REA 2

Evidence of the imposition of measures to prevent reproduction

- Evidence of castration experiments (A)(D)(E) Hoess, p. 14
- Evidence of experiments intended to produce sterilization (B)(D)(E) Hoess, p. 14
- Evidence of experiments causing premature termination of pregnancy and carried out on pregnant and child-bearing women (B)(D)(E) Hoess, p. 14
- Evidence of experiments of artificial insemination (B)(D)(E) Hoess, p. 14
- Evidence of experiments aimed at cancer research (B)(D)(E) Hoess, p. 14
- Evidence of x-ray experimentation on the fertility of victims (C)(D)(E) Eichmann, para. 159

[Conduct] The perpetrator meant to engage in conduct of imposing certain measures upon one or more persons

- Evidence that the perpetrator issued orders imposing measures intended to prevent births (B)(D)(E) Hoess, p. 14

The measures were imposed

Evidence that the perpetrator issued orders imposing measures intended to prevent births

- Evidence of an order to artificially terminate pregnancies (B)(D)(E) Hoess, p. 14
- Evidence of a ban on births (B)(D)(E) Hoess, p. 14

The measures were intended to prevent births

Evidence of the nature of imposed measures

- Evidence of castration, sterilisation and pregnancy termination experiments (B)(D)(E) Hoess, p. 14

[Consequence I] The perpetrator meant to prevent births within that group [OR]

No means of proof sourced from the dataset

[Consequence II] The perpetrator was aware that the measures imposed would prevent births within that group in the ordinary course of events

No means of proof sourced from the dataset

Within the group

Evidence of classification of a group

- Evidence of classification of a group as such by the political/military authorities (E) Krstić, para. 559
- Evidence of classification of a group as such within the Constitution (E) Krstić, para. 559

TYPOLOGY OF EVIDENCE

(A)	Victim statement
(B)	Witness statement
(C)	Accused statement
(D)	Expert witness statement
(E)	Documentary evidence
(F)	Medical records
(G)	Forensic evidence
(H)	Physical evidence
(I)	Phone, audio and video materials
(J)	Digital evidence
(K)	Maps, geo-location, building structure
(L)	Statistical data
(M)	Contextual data
(N)	Similar means of proof under different SGBV crimes/charges

10

10. Index of case law and commentaries	106
Introduction	107
Contextual Requirements of Sexual and Gender-Based Violence Crimes	109
Rape	109
Sexual slavery	110
Enforced prostitution	110
Forced pregnancy	111
Enforced sterilisation	111
Other forms of sexual violence of comparable gravity	111
Genocide by imposing measures intended to prevent births within a group	112

10. Index of case law and commentaries

1. Introduction

National legislation, case law and official documents

CAR, Décret n°15.007 du 8 janvier 2015 portant création d'une unité mixte d'intervention rapide et de répression des violences sexuelles faites aux femmes et aux enfants, 8 January 2015.

--- Government of the Central African Republic and the United Nations, Joint Communiqué of the Government of the Central African Republic and the United Nations, 12 December 2012.

--- Loi organique n°15.003 du 3 juin 2015 portant création, organisation et fonctionnement de la Cour Pénale Spéciale, 3 June 2015.

Colombia, Constitutional Court, Order No. 092/08, 14 April 2008.

--- Order No. 009/15, 27 January 2015.

--- AGO, Protocol for the Investigation of Sexual Violence, June 2016.

--- Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace, November 2016.

DRC, High Military Court, Case *Kakwavu*, Judgement, 7 November 2014.

--- Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, 31 December 2015, Official Journal of the DRC, 2 January 2016 ('Law modifying the Criminal Code 2015').

--- Loi n° 15/023 du 31 décembre 2015 modifiant la Loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire 31 December 2015, Official Journal of the DRC, 2 January 2016 ('Law modifying the Military Criminal Code 2015').

--- Loi n° 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 06 août 1959 portant Code de procédure pénale 31 December 2015, Official Journal of the DRC, 2 January 2016 ('Law modifying the Code of Criminal Procedure 2015').

--- Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire, 11 April 2013.

International case law and official documents

ICC, OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014.

ICC, The Prosecutor v. Bosco Ntaganda, TC VI, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Case No. ICC-01/04-02/06-1707, 4 January 2017.

ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, TC III, Judgment, Case No. ICC-01/05-01/08, 21 March 2016.

Other documents

FCO, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law (1st ed.), London, June 2014.

--- International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law (2nd ed.), London, March 2017.

ILAC and IBA, Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of the Congo, August 2009.

UN Action against Sexual Violence in Conflict, Stop Rape Now.

UN Women, UNiTE to End Violence Against Women Campaign.

Other sources

Global Justice Center, Global Justice Center Urges International Criminal Court to Investigate ISIS's Genocide against Yazidi Women and Girls, 22 December 2015.

ECCHR, Sexualised violence in the Colombian conflict – a matter for the International Criminal Court, April 2015.

Publicists

CMN, International Criminal Law Guidelines: Command Responsibility (2nd ed.), December 2016.

--- International Criminal Law Guidelines: Legal Requirements of Sexual and Gender-Based Violence Crimes, June 2017.

--- National Legal Requirements: Prosecution of Sexual and Gender-Based Violence in the Democratic Republic of Congo, March 2017.

Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014.

Morten Bergsmo, *Active Complementarity: Legal Information Transfer*, TOAEP, 2011.

--- (ed.), *Thematic Prosecution of International Sex Crimes*, TOAEP, Beijing, 2012.

--- Alf Butenschøn Skre and Elisabeth J. Wood (eds.), *Understanding and Proving International Sex Crimes*, TOAEP, Beijing, 2012.

Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, OUP, 2016.

Tessa Khan and Jim Wormington, “*Mobile Courts in the DRC: Lessons from Development for International Criminal Justice*”, in *Oxford Transitional Justice Research Working Paper Series*, 2011.

2. Contextual Requirements of Sexual and Gender-Based Violence Crimes

Other documents

FCO, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law* (2nd ed.), London, March 2017.

Publicists

Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014.

3. Rape

ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, TC III, Judgment, Case No. ICC-01/05-01/08-3343, 21 March 2016.

--- *The Prosecutor v. Germain Katanga*, TC II, Judgement pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014.

ICTR, *The Prosecutor v. Jean-Paul Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998.

--- *The Prosecutor v. Mikaeli Muhimana*, TC III, Judgement and Sentence, Case No. ICTR-95-1B-T, 28 April 2005.

--- *The Prosecutor v. Alfred Musema*, TC I, Judgement and Sentence, Case No. ICTR-96-13-A, 27 January 2000.

ICTY, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, TC, Judgement, Case No. IT-96-21-T, 16 November 1998.

--- *The Prosecutor v. Anto Furundžija*, TC II, Judgement, Case No. IT-95-17/1-T, 10 December 1998.

--- *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, TC II, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001.

--- *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, AC*, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002.

--- *The Prosecutor v. Jadranko Prlić, Bruno Vuković, Slobodan Prljak, Milivoj Petrović, Valentin Ćorić and Berislav Pušić*, TC, Judgement (Volume 1), Case No. IT-04-74-T, 29 May 2013.

--- *The Prosecutor v. Jadranko Prlić, Bruno Vuković, Slobodan Prljak, Milivoj Petrović, Valentin Ćorić and Berislav Pušić*, TC, Judgement (Volume 2), Case No. IT-04-74-T, 29 May 2013.

--- *The Prosecutor v. Jadranko Prlić, Bruno Vuković, Slobodan Prljak, Milivoj Petrović, Valentin Ćorić and Berislav Pušić*, TC, Judgement (Volume 3), Case No. IT-04-74-T, 29 May 2013.

4. Sexual slavery

ICC, *The Prosecutor v. Germain Katanga*, TC II, Judgement pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014.

--- *The Prosecutor v. Dominic Ongwen*, PTC II, Decision on the confirmation of charges against Dominic Ongwen, Case No. ICC-02/04-01/15-422-Red, 23 March 2016.

ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, TC II, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001.

SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, TC II, Judgement, Case No. SCSL-2004-16-T, 20 June 2007.

--- *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, TC I, Judgement, Case No. SCSL-04-15-T, 2 March 2009.

5. Enforced prostitution

Netherlands Temporary Court-Martial at Batavia, *Case No. 76*, Trial of Washio Awochi, Judgement delivered on 25 October 1946, as cited by UNWCC in *Law Reports of Trials of War Criminals*, 1 November 1997.

6. Forced pregnancy

ICC, *The Prosecutor v. Dominic Ongwen*, PTC II, Decision on the confirmation of charges against Dominic Ongwen, Case No. ICC-02/04-01/15-422-Red, 23 March 2016.

ICTR, *The Prosecutor v. Alfred Musema*, TC I, Judgement and Sentence, Case No. ICTR-96-13-A, 27 January 2000.

ICTY, *The Prosecutor v. Radovan Karadzic*, TC, Public Redacted Version of Judgement Issued on 24 March 2016 (Volume 1), Case No. IT-95-5/18-T, 24 March 2016.

--- *The Prosecutor v. Milorad Krnojelac*, AC, Judgement, Case No. IT-97-25-A, 17 September 2003.

7. Enforced sterilisation

IMT, *The USA vs. Karl Brandt et al.*, published in Trials of war criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (Volume I).

--- (Volume II).

8. Other forms of sexual violence of comparable gravity

Case law

ICC, *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein*, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012.

ICTR, *The Prosecutor v. Jean-Paul Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998.

ICTY, *The Prosecutor v. Radoslav Brđanin*, TC II, Judgement, Case No. IT-99-36-T, 1 September 2004.

ICTY, *The Prosecutor v. Milutinović et al.*, TC, Case No. IT-05-87-T, Judgement (Volume II), 26 February 2009.

Publicists

Joseph Powderly and Niamh Hayes, "Article 7", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed.), C.H. Beck/Hart/Nomos, 2016.

9. Genocide by imposing measures intended to prevent births within a group

ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement (TC), 2 August 2001.

The District Court of Jerusalem, *The Attorney General v. Adolf Eichmann*, Judgment, 11 December 1961.

The Supreme National Tribunal of Poland, *Case No. 38 Poland v. Hoess*, 29 March 1947 in UN War Crimes Commission, *Law Reports on Trials of War Criminals*, Volume VII, 1948.



I-DOC

Investigation
Documentation
System



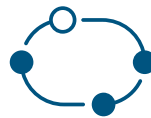
DOCF

Database on Open
Case Files



CICD

Core International
Crimes Database



CJAD

Cooperation and
Judicial Assistance
Database



CLICC

Commentary on the
Law of the International
Criminal Court



CM

Case Matrix

Case Matrix Network, Centre for International Law Research and Policy (CILRAP-CMN), 100 Avenue des Saisons 1050 Brussels, Belgium / blog.casematrixnetwork.org/toolkits/ / E-mail: ICJToolkits@casematrixnetwork.org

The CMN Knowledge Hub and Thematic Toolkits are developed and customised through several projects, including "Strengthening the Prosecution of Sexual Violence in Conflict: CAR, Colombia and DRC" which is implemented by the Case Matrix Network, the Commission for International Justice and Accountability and the University of Nottingham Human Rights Law Centre.

CMN ● Case Matrix Network

KNOWLEDGE-TRANSFER, LEGAL EMPOWERMENT, CAPACITY BUILDING



www.nottingham.ac.uk/hrlc



This project is funded by the UK Foreign and Commonwealth Office.